CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 72

THE UNITED STATES, PETITIONER

vs.

STANDARD RICE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 28, 1944
CERTIORARI GRANTED JUNE 12, 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 944

THE UNITED STATES, PETITIONER

vs.

STANDARD RICE COMPANY, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

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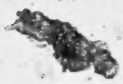

1 In the Court of Claims of the United States

No. 45584

STANDARD RICE COMPANY, INC., CLAIMANT

v.

UNITED STATES OF AMERICA, DEFENDANT.

Petition

Filed November 13, 1941

To the Honorable Chief Justice and the Associate Justices of the Court of Claims of the United States:

1. Claimant, Standard Rice Company, Inc., is now, and at all times material hereto has been, a corporation organized and existing under the laws of the State of Texas, having its principal office in Houston, Texas, and within the First Texas Internal Revenue Collection District.

2. The Commissioner of Internal Revenue, the Collector of Internal Revenue for the First Texas District, and the
2 Comptroller General of the United States, all hereinafter mentioned, were officers of the United States duly qualified and appointed to act for and on behalf of the United States in the matters hereinafter set forth.

3. On information and belief, claimant avers that each and every sum hereinafter stated to have been paid by it was paid to the Collector of Internal Revenue for the First Texas District, and was thereafter turned over and deposited by him with the Treasurer of the United States, in the usual course of official business.

4. On or prior to October 15, 1935, claimant filed with the Collector of Internal Revenue for the First Texas District, its federal income tax return for the fiscal year ended July 31, 1935, disclosing a tax due of Twenty-five Thousand Five Hundred Two and 43/100 Dollars ($25,502.43), which amount claimant paid to said Collector in four equal installments, one each on October 15, 1935, January 15, 1936, April 15, 1936, and July 15, 1936.

5. Thereafter, H. M. Clemow, one of the field agents of the Commissioner of Internal Revenue, audited claimant's income tax return for the fiscal year ended July 31, 1935, and determined that claimant had made an overpayment in income tax for that year in the amount of Two Thousand Three Hundred Thirty-four and 23/100 Dollars ($2,334.23). In due course, the Commissioner of Internal Revenue caused certificate of overassess-

ment No. 1408269 to be issued showing that this sum was owing to claimant. Copy of this certificate of overassessment is attached hereto as Exhibit A.

6. Payment not having been made on the overassessment (for reasons hereinafter set forth), claimant, on or about June 13, 1938, filed with the Collector of Internal Revenue for the First District of Texas, its claim for refund of said sum of Two Thousand Three Hundred Thirty-four and 23/100 Dollars ($2,334.23), being the overpayment of income taxes for the fiscal year ended July 31, 1935. Claimant has not received notice by the Commissioner of Internal Revenue by registered mail, or otherwise, of the disallowance of such claim for refund, or of any part thereof; and claimant avers on information and belief that the Commissioner of Internal Revenue has not mailed such notice.

7. On or prior to October 15, 1938, claimant filed with the Collector of Internal Revenue for the First Texas District, its federal income tax return for the fiscal year ended July 31, 1938, disclosing a tax due of Twenty-five Thousand Six Hundred Seventy-seven and 99/100 Dollars ($25,677.99), which amount claimant paid to said Collector, in four equal installments, one each on October 15, 1938, January 15, 1939, April 15, 1939, and July 15, 1939.

8. Thereafter, claimant discovered that, instead of having a net taxable income for the fiscal year ended July 31, 1938, it had sustained a net loss for that year, and that consequently the income tax had been erroneously and illegally paid and collected. Claimant thereupon, on or about October 13, 1939, filed claim for refund for such tax of Twenty-five Thousand Six Hundred Seventy-seven and 99/100 Dollars ($25,677.99), with the Collector of Internal Revenue for the First Texas District; and thereafter, field agents of the Commissioner of Internal Revenue audited claimant's income tax return for the year in question and determined that there had, in fact, been an overpayment by claimant of tax in the amount claimed. In due course, the Commissioner of Internal Revenue caused certificate of overassessment No. 2544993 to be issued showing that this sum ($25,677.99) was owing to plaintiff. Copy of this certificate of overassessment is attached hereto as Exhibit B.

9. On or about February 6, 1941, claimant received partial refund from the United States of the overpayment of income tax for the year ended July 31, 1938, such partial payment amounting to Nineteen Thousand Five Hundred Thirty-two and 62/100 Dollars ($19,532.62), plus interest thereon. Refund of the balance of Six Thousand One Hundred Forty-five and 37/100 Dollars ($6,145.37) has not been made, for reasons hereinafter set forth.

10. Since the filing of the above mentioned claim for refund for Twenty-five Thousand Six Hundred Seventy-seven and 99/100 Dollars ($25,677.99) on account of overpayment of income tax for the fiscal year ended July 31, 1938, claimant has not received notice by the Commissioner of Internal Revenue by registered mail, or otherwise, of the disallowance of such claim for refund, or of any part thereof; and claimant avers on information and belief that the Commissioner of Internal Revenue has not mailed such notice.

11. On or about November 13, 1935, Claimant entered into a contract with defendant, being contract No. NOs-45097 (copy of which is attached hereto as Exhibit C), under which claimant agreed to supply rice to the Navy Department at the bid prices specified in the contract. As more exactly appears from the contract, the prices fixed therein for the rice sold thereunder
5 were stated as flat amounts per pound, such prices representing the total cost of the rice to the United States. The amount of tax, if any, applicable to the rice sold was not shown separately, but was "buried in the price" along with costs of raw materials, labor, transportation, etc.

12. As appears from Exhibit C, the contract contained the following provision:

"Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item."

13. With respect to the rice delivered under the contract, and the processing thereof, plaintiff paid all valid taxes, duly and legally imposed. Under the terms of the contract, Claimant delivered to the United States 584,800 pounds of milled rice, and received full payment therefor from the United States, in accordance with the terms of the contract, in December, 1935, and January, February, and March, 1936.

14. On April 1, 1935, pursuant to the provisions of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended, a tax of one cent (1¢) per pound on the first domestic processing of rough rice was imposed. Claimant paid the tax on rice processed by it from April 1, 1935 to September 30, 1935. Before paying the tax on rice processed in October 1935, how-
6 ever, claimant sought, in a proceeding filed by it in the United States District Court for the Western District of

Texas (No. 577 in Equity) to enjoin the collection of the tax on rice processed in October 1935 and thereafter, on the ground of the invalidity of the Agricultural Adjustment Act. That court did enjoin the collection of the tax by the Collector of Internal Revenue for the First Texas District upon the condition that, awaiting a decision by the Supreme Court of the United States on the constitutionality of the Act, claimant deposit in a San Antonio, Texas, bank the amount equal to the processing taxes accrued each month. Complying with this condition, claimant deposited the October and November, 1935, taxes in the designated bank, but before the deposit covering December processing was made, the Agricultural Adjustment Act was held unconstitutional by the Supreme Court of the United States, and claimant simply did not make any payments with respect to that period. After the Supreme Court rendered its decision on January 6, 1936, declaring the Act invalid, the money so deposited was returned to claimant.

15. Rough rice is (and was at the time claimant and the United States entered into Contract No. NOs-45097) bought and sold on the open market, at fluctuating prices which are influenced by many different factors, and neither claimant nor any other rice miller controls and can control such prices. Likewise, clean rice is sold on the open market at fluctuating prices, influenced not only by general economic factors, but also by factors peculiar to the rice business, such as prices of directly competitive foods (wheat, potatoes, etc.). Thus, neither claimant nor any other rice miller, could arbitrarily depress the market for rough rice or
7 arbitrarily raise the price of clean rice to the extent of the processing tax imposed, or necessarily to any substantial part thereof. The extent to which claimant bore the tax or shifted it to others is incapable of ascertainment with even a fair degree of accuracy, and this was particularly true for the period (October 1, 1935, to January 6, 1936), during which claimant was relieved of payment of the processing tax, when the market price of rice was strongly affected by the general impression, then prevailing, that the Agricultural Adjustment Act was invalid, and that impounded funds would be returned to processors. Claimant cannot be said to have received, by virtue of its receipt of the impounded funds, anything belonging in equity to the United States.

16. The Comptroller General, on behalf of the United States, asserted claim against claimant for Eight Thousand Four Hundred Seventy-nine and 60/100 Dollars ($8,479.60) (being United States claim No. 0280086), on the erroneous theory that there had been an overpayment by the United States on contract No. NOs-45097, since claimant had failed to pay the processing tax on the

rice delivered under the contract. In computing the amounts claimed, the Comptroller General used $.0145 per pound of milled or clean rice as the equivalent of the processing tax of $.01 per pound of rough rice. This conversion factor of $.0145 per pound was established by Regulations made, pursuant to the Agricultural Adjustment Act, by the Secretary of Agriculture, with the approval of the President, dated March 30, 1935, as revised and, in part, superseded by Regulations made by the Acting Secretary of Agriculture, with the approval of the President, dated
8 July 31, 1935, Treasury Decision 4586. The amount of $8,479.60 claimed by the Comptroller General was computed as follows:

Item	Quantity (pounds)	Tax rate (per lb.)	Total tax
Rice	584,800	0.0145	$8,479.60

17. As heretofore alleged, payment of Two Thousand Three Hundred Thirty-four and 23/100 Dollars ($2,334.23) under certificate of overassessment No. 1408269, issued by the Commissioner of Internal Revenue on account of claimant's overpayment of income taxes for the fiscal year ended July 31, 1935, was withheld by the Comptroller General, who, on July 30, 1937, and January 10, 1938, issued his Notices of Settlement of Claim of the General Accounting Office (certificate No. 0455908, dated July 30, 1937, and certificate No. US-4738-Navy, dated January 10, 1938; claim No. 0280086), in which he certified that Two Thousand Three Hundred Thirty-four and 23/100 Dollars ($2,334.23) was due to claimant on account of income tax overassessed for the taxable year ended July 31, 1935, but that this sum had been credited by him against the alleged indebtedness of Eight Thousand Four Hundred Seventy-nine and 60/100 Dollars ($8,479.60) under contract No. NOs-45097, leaving a balance on said indebtedness of Six Thousand One Hundred Forty-five and 37/100 Dollars ($6,145.37). Copies of such Notices of Settlement of Claim of the General Accounting Office are attached hereto as Exhibits D and E, respectively.

18. As heretofore alleged, payment of Six Thousand One Hundred Forty-five and 37/100 Dollars ($6,145.37) under certificate of overassessment No. 2544993, issued by the Commis-
9 sioner of Internal Revenue for Twenty-five Thousand Six Hundred Seventy-seven and 99/100 Dollars ($25,677.99) on account of claimant's overpayment of income taxes for the fiscal

year ended July 31, 1938, was withheld by the Comptroller General who, on April 24, 1941, issued his Notice of Settlement of Claim of the General Accounting Office (claim No. 0280086(3)), in which he stated that $6,145.37, representing refund to claimant of income tax overassessed for the taxable year ended July 31, 1938, was allowed in full, but that this sum was being credited by him against the balance of $6,145.37 of the alleged indebtedness under contract No. NOs-45097. Copy of this Notice Settlement of Claim of the General Accounting Office is attached hereto as Exhibit F.

19. On or about October 28, 1939, claimant paid to the Collector of Internal Revenue for the First Texas District Seventy-two Thousand Seventy-two and 30/100 Dollars ($72,072.30) in unjust enrichment taxes, imposed by Title III of the Revenue Act of 1936, on account of its having been relieved of the payment of processing taxes as set out in paragraph 14 above.

20. No portion of the overpayments of income tax for the fiscal years ended July 31, 1935, and July 31, 1938, which were wrongfully and illegally withheld by the Comptroller General, as aforesaid, has ever been refunded, repaid, or legally credited.

21. Claimant has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said government, and it is the sole and absolute owner of the claim herewith presented; claimant has made no transfer or assignment of said claim, or of any part thereof, and it is justly entitled to the amounts claimed herein from the United States after allowing all just credits and set-offs.

Claimant therefore prays for judgment in its favor against the United States of America, for the sum of Two Thousand Three Hundred Thirty-four Dollars, Twenty-three Cents ($2,334.23), plus the sum of Six Thousand One Hundred Forty-five Dollars, Thirty-seven Cents ($6,145.37), representing overpayments of income taxes for the taxable years ended July 31, 1935 and July 15, 1938, respectively, wrongfully and illegally withheld or credited by defendant, plus interest on both amounts as required by law, and the costs and disbursements of this action, and for such other and further relief as may to this Honorable Court seem just and proper.

JOHN C. WHITE,
838 Transportation Building, Washington, D. C.,
Attorney for Claimant.

[*Duly sworn to by John C. White; jurat omitted in printing*]

11 *Exhibit A to petition*

TREASURY DEPARTMENT

OFFICE OF COMMISSIONER OF INTERNAL REVENUE

WASHINGTON

Income Tax Unit.
IT:C:CC.

CERTIFICATE OF OVERASSESSMENT

Number: 1408269.
Allowed: $2,334.23.
Schedule No. 59672.

STANDARD RICE COMPANY, INC.,
Post Office Drawer 2731, Houston, Texas.

SIRS: An audit of your income tax return, form 1120 and a consideration of all the claims (if any) filed by you for the Fiscal year ended July 31, 1935 indicates that the tax assessed for that year was in excess of the amount due:

Income Tax Assessed:	
Original, account #400031 October	$25,502.43
Correct tax liability	23,168.20
Overassessment	2,334.23

The adjustments producing this overassessment are shown in the revenue agent's report, a copy of which has been furnished you under date of November 10, 1936.

The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 322 of the Revenue Act of 1934.

12 The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

By direction of the Deputy Commissioner:

Respectfully,

F. L. HUDSON,
Head of Division.

Credited: $ (Copy of Certificate Attached).
Refunded: $2,334.23.

NOTE.—The interest, if any, included herein is taxable income, and must be included in your income tax return for the year in which received.

GENERAL ACCOUNTING OFFICE

WASHINGTON

Audit Division.

PREAUDIT DIFFERENCE STATEMENT

BUREAU OF INTERNAL REVENUE,
TREASURY DEPARTMENT,
March 31, 1937.

Schedule No. IT–59672

(Name of payee) Standard Rice Co., Inc.; (Bureau Voucher No.) List 7122.

Amount proposed for payment, $2,429.13.

Schedule returned without certification of the amount indicated above.

The records of this office indicate that Standard Rice Co. Inc., is indebted to the U. S. for processing tax.

It is requested that the name of the taxpayer be eliminated from this schedule and the amount shown above rescheduled to this office for direct settlement.

CERTIFICATE OF SETTLEMENT

GENERAL ACCOUNTING OFFICE,
Washington, D. C.,
July 30, 1937.

Certificate No. 0455908.
Claim No. 0280086.
Treas.

STANDARD RICE COMPANY, INCORPORATED,
POST OFFICE DRAWER 2731, HOUSTON, TEXAS.

Check to issue as noted below:

I certify there is due from the United States to the above-named claimant(s), payable from the appropriation(s) indicated, the sum of Two Thousand Three Hundred Thirty-four and 23/100 Dollars ($2,334.23) on account of payment of income tax overassessed for the taxable year ended July 31, 1935, certificate of overassessment Number 1408269, as listed on supplemental Schedule No. IT–59672, dated April 5, 1937.

2080903 Refunding Internal Revenue Collections, 1938 and Prior Years.

Check to issue:

Treasurer of the United States for deposit to the credit of the appropriation: "17–0806 Naval Supply Account Fund."

This action is taken to effect partial collection of the indebtedness of Standard Rice Company, Inc., under Contract No. Nos.–45097, dated November 13, 1935, described herein resulting
14 from overpayments consisting of the amount of processing tax included in the price of supplies paid for on the described vouchers but which, as indicated by the record, has not been paid by the contractor to the United States.

Total tax included in bid price and deductible under above contract, $8,479.60.

The amount of $2,334.23 having been set-off against the indebtedness of $8,479.60, as explained above, there remains due the United States under the contract No. Nos.–45097, supra, a balance of $6,145.37. Remittance of this amount should be made promptly to this office by bank draft or certified check made payable to "The United States."

Issue warrant(s) and send check(s) to claimant(s).

R. N. ELLIOTT,
Acting Comptroller General
of the United States.

By J. H. ROE.

(Division of Disbursement.)

15 *Exhibit B, to petition*

TREASURY DEPARTMENT

OFFICE OF COMMISSIONER OF INTERNAL REVENUE

WASHINGTON

Income Tax Unit
IT:C1:CC

CERTIFICATE OF OVERASSESSMENT

Number: 2544993.
Allowed: $25,677.99.
Schedule No. 74630.

STANDARD RICE COMPANY, INC.,
Butler Street and S. P. Railroad, Houston, Texas.

SIRS: An audit of your income tax return, Form 1120, and a consideration of all the claims (if any) filed by you for the taxable year ended July 31, 1938, indicates that the tax assessed for that year was in excess of the amount due:

Tax Assessed:	Income Tax
Original, account No. Oct. 1938, #400044	$25,677.99
Correct liability	None
Overassessment	25,677.99

This overassessment is in accordance with adjustments to your tax liability to which you have agreed.

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

16 Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

By direction of the Deputy Commissioner:

Respectfully,

T. C. ATKESON,
Head of Division.

Refunded: $19,532.62—Balance of $6,145.37 withheld by the Comptroller General for direct settlement of a debt to the United States.

Interest: $2,018.13

NOTE.—The interest, if any, included herein is taxable income and must be included in your income tax return for the year in which received.

17 *Exhibit C to petition*

STATEMENT AND CERTIFICATE OF AWARD

No. Nos-45097.
Date: 11-13-35.
Washington, D. C.
Bureau of Supplies and Accounts.
S-5916.
Navy Department.

Method of or Absence of Advertising

(Section 3709 of the Revised Statutes)

1. After advertising in newspapers.

2. (a) After advertising by circular letters sent to ---------- ---------- dealers.

(b) And by notices posted in public places.

(If notices were not posted in addition to advertising by circular letters sent to dealers, explanation of such omission must be made. The notation on the certificate below must be "2 (a) (b)" or "2 (a)," depending on whether or not notices were posted.)

3. Without advertising, under an exigency of the service which existed prior to the order and would not admit of the delay incident to advertising.

4. Without advertising in accordance with _____

5. Without advertising, it being impracticable to secure competition because of _____

(Here state circumstances under which the securing of competition was impracticable.)

Award of Contract

Lots 178, 180, 181, 182 awarded the low bidder.

A. To lowest bidder as to price (Expenditures).
B. To other than the lowest bidder as to price (Expenditures).
C. To highest bidder as to price (Receipts).
D. To other than the highest bidder as to price (Receipts).

18 Certificate

I certify that the foregoing statement is true and correct; that the agreement was made in consequence of No. 1 of the method of or absence of advertising and in accordance with award of contract lettered B, as shown above; that where lower bids (expenditure contracts) or higher bids (receipt contracts) as to price were received, a statement of reasons for their rejection, together with an abstract of bids received, including all lower than that accepted in case of expenditure contracts and all higher in case of receipt contracts, is given below or on the reverse hereof or on a separate sheet attached hereto; that the articles or services covered by the agreement (expenditure) are necessary for the public service, and that the prices charged are just and reasonable.

	Lot 184	
	Bid A	Bid B
Standard Rice Co., Inc. (Award)	0.0473	
Empire Wholesale Co., Inc.		0.0484
Rickert Rice Mills, Inc.		.0451025
Western States Grocery Co.		.045

5 bids received. The other bid was higher than the highest price listed.

NOTE.—The accepted Bid "A" was the lowest one received after freight, handling and other charges were added to the f. o. b. prices listed above.

D. B. WAINWRIGHT, Jr.,
Capt. (S. C.) U. S. N.

NOTE.—This statement and certificate will be used to support all agreements, both formal contracts and less formal agreements

of whatever character, involving the expenditure or receipt of public funds. It must be executed and signed by the contracting officer (unless the award is made by or is subject to approval by an officer other than the contracting officer, when execution and signature may be made by such officer).

19 ORIGINAL

Contract No. NOs. 45097.
Opening, October 29th, 1935.

STANDARD GOVERNMENT FORM OF CONTRACT

(As modified for the use of the Navy Department)

(Supplies)

NAVY DEPARTMENT.

BUREAU OF SUPPLIES AND ACCOUNTS

Contract for Rice. Amount, $27,185.25.
Place, Various.

This Contract, entered into this 13th day of November, 1935, by the United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and Standard Rice Company Inc., a corporation organized and existing under the laws of the State of Texas, of the city of Houston, in the State of Texas, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. Scope of this Contract.—The contractor shall furnish and deliver all supplies or services covered by the items or lots hereto attached, for the consideration stated opposite each item or each lot in the schedules, in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof.

Deliveries shall be made as follows: As stated in the schedules concerned.

ARTICLE 2. Changes.—Where the supplies to be furnished are to be specially manufactured in accordance with Government drawings and specifications, the contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings or specifications, except Government Master Specifications. Changes as to shipment and
20 packing of all supplies may also be made as above provided.

If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its perform-

ance, an equitable adjustment shall be made, and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or chief of bureau. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 12 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the contract as changed.

ARTICLE 3. Extras.—Except as otherwise herein provided, no charge for extras will be allowed unless the same have been ordered in writing by the contracting officer and the price stated in such order.

ARTICLE 4. Inspection.—(a) All material and workmanship shall be subject to inspection and test at all times and places and, when practicable, during manufacture. The Government shall have the right to reject articles which contain defective material or workmanship. Rejected articles shall be removed by and at the expense of the contractor promptly after notification of rejection.

(b) If inspection and test, whether preliminary or final, is made on the premises of the contractor or subcontractor, the contractor shall furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient inspections and tests required by the inspectors in the performance of their duty. All inspections and tests by the Government shall be performed in such a manner as not to unduly delay the work. Special and performance tests shall be as described in the specifications. The Government reserves the right to charge to the contractor any additional cost of inspection and test when articles
21 are not ready at the time inspection is requested by the contractor.

(c) Final inspection and acceptance of materials and finished articles will be made after delivery, unless otherwise stated. If final inspection is made at a point other than the premises of the contractor or a subcontractor, it shall be at the expense of the Government except for the value of samples used in case of rejection. Final inspection shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud. Final inspection and acceptance or rejection of the materials or supplies shall be made as promptly as practicable, but failure to inspect and accept or reject materials or supplies shall not impose liability on the Government for such materials or supplies

as are not in accordance with the specifications. In the event public necessity requires the use of materials or supplies not conforming to the specifications, payment therefor shall be made at a proper reduction in price.

ARTICLE 5. Delays—Damages.—If the contractor refuses or fails to make deliveries of the materials or supplies within the time specified in Article 1, or any extension thereof, the Government may terminate the right of the contractor to proceed with deliveries or such part or parts thereof as to which there has been delay. In such event, the Government may purchase similar materials or supplies in the open market or secure the manufacture and delivery of the materials and supplies by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby: Provided, That the contractor shall not be charged with any excess cost occasioned the Government by the purchase of materials or supplies in the open market or under other contracts when the delay of the contractor in making deliveries is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or of the.....floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather but not including delays caused by subcontractors: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and extent of delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal within thirty days by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

22

ARTICLE 6. Responsibility for supplies tendered.—The contractor shall be responsible for the articles or materials covered by this contract until they are delivered at the designated point, but the contractor shall bear all risk on rejected articles or materials after notice of rejection. Where final inspection is at point of origin but delivery by contractor is at some other point, the contractor's responsibility shall continue until delivery is accomplished.

ARTICLE 7. Increase or decrease.—Unless otherwise specified, any variation in the quantities herein called for, not exceeding 10 per cent, will be accepted as a compliance with the contract, when caused by conditions of loading, shipping, packing, or allowances in manufacturing processes, and payments shall be adjusted accordingly.

ARTICLE 8. Payment.—The contractor shall be paid, upon the submission of properly certified invoices or vouchers, the prices stipulated herein for articles delivered and accepted or services rendered, less deductions, if any, as herein provided. Unless otherwise specified, payments will be made on partial deliveries, accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the contractor, payments for accepted partial deliveries shall be made whenever such payments would equal or exceed either $1,000 or 50 per cent of the total amount of the contract.

ARTICLE 9. Additional security.—Should the surety upon
23 any bond that is furnished for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government.

ARTICLE 10. Officials not to benefit.—No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE 11. Covenant against contingent fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

ARTICLE 12. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties hereto as to such questions of fact. In the meantime the contractor shall diligently proceed with performance.

ARTICLE 13. Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved or his assistant.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

24. ARTICLE 14. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

ARTICLE 15.—Patents.—The contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind, including costs and expenses, for or on account of any patented or unpatented invention, article, or appliance manufactured or used in the performance of this contract, including their use by the Government, unless otherwise specifically stipulated in this contract.

INSTRUCTIONS FOR THE CONTRACT

1. This form or Standard Form No. 33 shall be used whenever a formal contract is entered into for the procurement of supplies and manufactured articles, whether stock or special, except coal, but their use will not be required in foreign countries.

2. There shall be no deviation, from this Standard Contract Form, except as provided for in these instructions, without prior approval of the Director of the Bureau of the Budget obtained through the Interdepartmental Board of Contracts and Adjustments. Where interlineations, deletions, additions, or other alterations are permitted, specific notations of the same shall be entered in the blank space following the article entitled "Alterations" before signing. This article is not to be construed as general authority to deviate from the standard form. Deletion of the descriptive matter not applicable in the preamble need not be noted in the article entitled "Alterations."

3. All blanks spaces must be filled in or ruled out. The contract must be dated, and the bond must bear the same or subsequent date.

25 4. An officer of a corporation, a member of a partnership, or an agent signing for the principal, shall place his signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the contractor.

5. If the contractor is a corporation, one of the certificates following the signatures of the parties must be executed. If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate seal, or the second certificate executed by the contracting officer. In lieu of either of the foregoing certificates there may be attached to the contract copies of so much of the

records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

6. The full name and business address of the contractor must be inserted, and the contract signed with his usual signature. Typewrite or print name under all signatures to contract and bond.

INSTRUCTIONS FOR THE BOND

1. This form shall be used for construction work or the furnishing of supplies, whenever a bond is required.

2. The surety on the bond for any bid or for the performance of the contract may be any corporation authorized by the Secretary of the Treasury to act as surety, or two responsible individual sureties. Individual sureties shall justify in sums aggregating not less than double the penalty of the bond.

3. A firm, as such, will not be accepted as a surety, nor a partner for copartners or for a firm of which he is a member. Stock-
26 holders of a corporate principal may be accepted as sureties provided their qualifications as such are independent of their stock holdings therein. Sureties, if individuals, shall be citizens of the United States, except that sureties on bonds executed in any foreign country, the Canal Zone, the Philippine Islands, Puerto Rico, Hawaii, Alaska, or any possession of the United States, for the performance of contracts entered into in these places, need not be citizens of the United States, but if not citizens of the United States shall be domiciled in the place where the contract is to be performed.

4. The name, including full Christian name, and residence of each individual party to the bond shall be inserted in the body thereof, and each such party shall sign the bond with his usual signature on the line opposite the scroll seal, and if signed in Maine, Massachusets, or New Hampshire, an adhesive seal shall be affixed opposite the signature.

5. If the principals are partners, their individual names shall appear in the body of the bond, with the recital that they are partners composing a firm, naming it, and all the members of the firm shall execute the bond as individuals.

6. The signature of a witness shall appear in the appropriate place, attesting the signature of each individaul party to the bond.

7. If the principal or surety is a corporation, the name of the State in which incorporated shall be inserted in the appropriate place in the body of the bond, and said instrument shall be executed and attested under the corporate seal as indicated in the form. If the corporation has no corporate seal the fact shall be stated, in

which case a scroll or adhesive seal shall appear following the corporate name.

8. The official character and authority of the person or persons executing the bond for the principal, if a corporation, shall be certified by the secretary or assistant secretary, according to the form attached hereto. In lieu of such certificate there may be attached to the bond copies of so much of the records of the corporation as will show the official character and
27 authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate sea, to be true copies.

9. Each individual surety shall justify, under oath, according to the form appearing on the bond, before a United States commissioner, a clerk of a United States court, a notary public, or some other officer having authority to administer oaths generally. If the officer has an official seal it shall be affixed, otherwise the proper certificate as to his official character shall be furnished. Where citizenship is not required, as provided in paragraph 3 of these Instructions, the affidavit may be amended accordingly.

10. The certificate of sufficiency shall be signed by an officer of a bank or trust company, or by a judge or clerk of a court of record, a United States district attorney or commissioner, a postmaster, a collector or deputy collector of internal revenue, or any other officer of the United States acceptable to the department or establishment concerned.

11. The date of the bond must not be prior to the date of the instrument for which it is given.

AFFIDAVIT BY INDIVIDUAL SURETY

STATE OF TEXAS,
County of Harris, ss:

I, W. K. Morrow, being duly sworn, depose and say that I am one of the sureties to the foregoing bond; that I am a citizen of the United States, and of full age and legally competent; that I reside at 3000 Calumet Drive, and that I am worth in real estate and personal property the sum of Ten Thousand dollars, over and above (1) all my debts and liabilities, owing and incurred, (2) any property exempt from execution, (3) and aggregate full penalties on all other bonds on which I am surety, and (4) any pecuniary interest I have in the business of the principal on said bond; that I own, unincumbered, real estate, the fee of which is in my name, worth Ten Thousand dollars, located in Hous-
28 ton, Texas; that said property is not exempt from seizure and sale under any homestead law, community, or marriage

law, or upon any attachment, execution, or judicial process, and that I am not surety on any other bonds, except as follows:

* * * * * * *

W. K. MORROW.
(Surety's signature.)

Subscribed and sworn to before me this 26th day of November, 1935, at Houston, Texas.

H. G. MURCH,
Notary Public in and for Harris
[OFFICIAL SEAL] *County, State of Texas.*,
(Title of official administering oath.)

AFFIDAVIT BY INDIVIDUAL SURETY

STATE OF TEXAS,
County of Harris, ss:

I, E. W. Gruendler, being duly sworn, depose and say that I am one of the sureties to the foregoing bond; that I am a citizen of the United States, and of full age and legally competent; that I reside at 4218 Yoakum Blvd. and that I am worth in real estate and personal property the sum of Ten Thousand dollars, over and above (1) all my debts and liabilities, owing and incurred, (2) any property exempt from execution, (3) the aggregate full penalties on all other bonds on which I am surety, and (4) any pecuniary interest I have in the business of the principal on said bond; that I own, unincumbered, real estate, the fee of which is in my name, worth Ten Thousand dollars, located in Houston, Texas; that said property is not exempt from seizure and sale under any homestead law, community, or marriage law, or upon any attachment, execution, or judicial process; and that I am not surety on any other bonds, except as follows:

* * * * * * *

E. W. GRUENDLER.
(Surety's signature.)

29 Subscribed and sworn to before me this 26th day of November, 1935, at Houston, Texas.

[OFFICIAL SEAL] H. G. MURCH,
Notary Public in and for Harris County,
State of Texas.

(Title of official administering oath.)

CERTIFICATE OF SUFFICIENCY

I, P. B. Timpson, do hereby certify that W. K. Morrow, one of the sureties named above, is personally known to me, and that, to the best of my knowledge and belief, the facts stated by such surety in the foregoing affidavit are true.

P. B. TIMPSON,
President, Houston Land & Trust Co.,
Houston, Texas.

(Address.)

CERTIFICATE OF SUFFICIENCY

I, P. B. Timpson, do hereby certify that E. W. Gruendler, one of the sureties named above, is personally known to me, and that, to the best of my knowledge and belief, the facts stated by such surety in the foregoing affidavit are true.

P. B. TIMPSON,
President, Houston Land & Trust Co.,
Houston, Texas.

(Address.)

NOTE.—As payment under this contract or any modification thereof can be made only by the Bureau of Supplies and Accounts, no work is to be undertaken involving additional cost or involving a modification in the specifications, drawings, terms, or conditions of this contract, until and unless such additional work or modification has been agreed to in writing by the Bureau of Supplies and Accounts.

Bids on this schedule of supplies for the U. S. Navy will be opened at 10:00 A. M. October 29, 1935.
Schedule 5916
(Supplies and Accounts.)

Original Duplicate
Indicate which by erasure

RICE

Send this schedule, accompanied by bid on standard government form of bid (standard form No: 31, Navy edition), both in duplicate, properly executed in accordance with instructions.

To the
Bureau of Supplies and Accounts,
Navy Department, Washington, D. C.
Bid of

Full Name of Bidder_____
Address_____
Discount: Subject to the conditions specified in Standard Form No. 31, accompanying this schedule, discount will be allowed for payment within calendar days as follows:
Within 10 days____; Within 20 days____; Within 30 days____;
(After Delivery) (After Delivery) (After Delivery)
Bids offering a discount upon any other basis should clearly state the conditions under which the discount is offered.
Delivery to be in accordance with the Conditions Governing Delivery of Supplies to the Navy.
Bids are requested on the basis that if subsequent legislation shall require observance of minimum wages and/or maximum hours of employment and/or limitation as to age of em-
31 ployees in the performance of Government contracts any contract entered into shall be subject to modification to accord with such statutory requirements to the extent authorized or required by law.
Unless otherwise specified by the bidder, it is understood and agreed that only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced, or manufactured, as the case may be, in the United States shall be delivered pursuant to a contract awarded as a result of this bid.
Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item.
Specifications and General Conditions Governing all Lots of this Schedule as Applicable.
Except as amended, the rice shall be in accordance with "Federal Specification N–R–351," dated April 28, 1931, copies of which may be obtained upon application to the supply officer of any navy yard, the Navy Purchasing Offices, New York, N. Y., and San Francisco, Calif., or to the Bureau of Supplies and Accounts,

Page 1—
Paragraph B–2—
Grade 1—delete "uncoated."
Grade 2—delete "uncoated."

The rice may be of any of the varieties specified under Class A, B and C of the specifications, and shall be Grade 2, Fancy, U. S. No. 2.

32 Attention of bidders is invited to paragraph H1b (1) of the specifications relative to packaging, packing, and marking.

The words "of the latest crop" in paragraph C–1 of specifications is interpreted as rice grown within the current year.

No Samples are Required and None Should be Submitted.

If award for Lots 183 and 184 is made under Bid B for delivery f. o. b. cars at or near contractor's works and shipment is directed subject to final inspection after delivery, it is hereby agreed that the title will pass to the Government at the point of shipment, with the understanding that the material will be inspected at ultimate destination; if rejected, title to revert to the contractor and and material to be held at contractor's risk. It is further agreed that if the material is not in accordance with the specifications covered by the contract, it will be replaced at contractor's expenses with other material, upon receipt of notice of rejection.

The expense of replacing material is to be paid by the contractor and title only to pass to the United States upon delivery at ultimate destination, subject to inspection. The contractor further agrees that payment is due only after inspection.

Deliveries for the Navy Yard, Brooklyn, N. Y., shall be made as follows:

Shipments via water carriers shall be consigned to the Supply Officer, Building #3, Navy Yard, Brooklyn, N. Y. Drayage charges are assessed from steamship dock in port of New York and drayage services must be arranged for and payment made by contractors.

Shipments via rail carriers, whether in carload or less than carload lots, should be consigned to supply officer, Building #3, Navy Yard, Brooklyn, N. Y. The navy yard is prepared to receive carload lots by float or lighter. Less than carload lots should be consigned to nearest railroad terminal, from which drayage services must be arranged for and payment made by contractors.

33 The tariff charge assessed by the railroad for unloading materials from the railroad company's lighter to the docks at the Navy Yard, Brooklyn, N. Y., is payable by the shipper as a part of the transportation costs.

Deliveries for the Naval Clothing Depot, Brooklyn, N. Y., shall be made as follows:

Shipments via water carriers should be consigned to the Supply Officer, Annex, Naval Clothing Depot, Twenty-ninth Street and Third Avenue, Brooklyn, N. Y. Drayage charges are assessed from steamship dock in port of New York to Naval Clothing Depot and drayage services must be arranged for and payment made by contractors.

Shipments via rail carriers whether in carload or less than carload lots should be consigned to the Supply Officer, Annex, Naval Clothing Depot, Twenty-ninth Street and Third Avenue, Brooklyn, N. Y., for delivery via Bush Terminal Railroad. Drayage charges are assessed from Bush Terminal Freight Station to the Naval Clothing Depot on less than carload shipments and drayage services must be arranged for and payment made by contractors.

Bids will be rejected if the information requested under each lot is not inserted by the bidder, provided it is decided by the Bureau of Supplies and Accounts that the information is essential.

Unless Otherwise Directed, Bids are Desired Only for Delivery, All Transportation Charges Paid, to the Destinations Named in the Schedule, the Right Being Reserved to Reject Bids for Delivery to Points Other Than Those Specified Under Each Lot.

Inspection will be made After Delivery.

Lot 178—Schedule 5916

Bureau Reqn. 153 NSAF. 13-x-1.
Bureau: S and A.
Purpose: Stock.

To be delivered, all transportation charges paid, to the
34 Supply Officer, Navy Yard, Boston (Charlestown), Mass., within 20 days after date of contract or bureau order.

Bidders must insert in the above blank space the shortest time within which they can guarantee delivery. Bidders are requested to estimate this time carefully.

Item	Pounds (about)	Unit price (per pound)	Total
1. Rice	25,000	.04665	$1,166.25

Name of packer (not the dealer) Standard Rice Company Inc.
Address Houston, Texas.
For specifications and general conditions see front page of this schedule.
Address _____
For specifications and general conditions see front page of this schedule.

The Right is Reserved to Make Award for Lot 179 or Lot 180 as may be Considered to be to the Best Interest of the Government.

Lot 180—Schedule 5916

Bureau Reqn. 153. NSAF. 13–x–1.
Bureau: S and A.
Purpose: Stock.

To be delivered, all transportations charges paid, to the Supply Officer, Annex, Naval Clothing Depot, Brooklyn, N. Y., within 15 days after date of contract or bureau order.

Bidders must insert in the above blank space the shortest time within which they can guarantee delivery. Bidders are requested to estimate this time carefully.

Item	Pounds (about)	Unit price (per pound)	Total
1. Rice	40,000	0.4575	$1,830.00

Name of packer (not the dealer) Standard Rice Company Inc.

35 Address Houston, Texas.

For Specifications and general conditions see front page of this schedule.

The Right is Reserved to make Award for Lot 180 or Lot 179 as may be Considered to be to the Best Interest of the Government.

Lot 181—Schedule 5916

Bureau Reqn. 153 NSAF. 13–x–1.
Bureau: S and A.
Purpose: Stock.

To be delivered, all transportation charges paid, to the Supply Officer, Navy Yard, Philadelphia, Pa., within 15 days after date of contract or bureau order.

Bidders must insert in the above blank space the shortest time within which they can guarantee delivery. Bidders are requested to estimate this time carefully.

Item	Pounds (about)	Unit price (per pound)	Total
1. Rice	30,000	0.0463	$1,389.00

Name of packer (not the dealer) Standard Rice Company Inc.
Address Houston, Texas.

For specifications and general conditions see front page of this schedule.

Lot 182—Schedule 5916

Bureau Reqn. 153 NSAF. 13–x–1.
Bureau: S and A.
Purpose: For stock.

To be delivered, all transportation charges paid, to the Officer-in-Charge, Naval Supply Depot, Naval Operating Base, Sewall's Point, Va., within 20 days after date of contract or bureau order. Bidders must insert in the above blank space the shortest time within which they can guarantee delivery. Bidders are requested to estimate this time carefully.

36 Item	Pounds (about)	Unit price (per pound)	Total
1. Rice	290,000	0.046	$13,340.00

Name of packer (not the dealer) Standard Rice Company Inc.
Address, Houston, Texas.
For specifications and general conditions see front page of this schedule.
Approximate shipping weight
Volume in cubic feet ready for shipment
For specifications and general conditions see front page of this schedule.

Lot 184—Schedule 5916

Bureau Reqn. 153 NSAF. 13–x–1.
Bureau: S and A.
Purpose: Stock.

For Bid A

Bids are desired as follows:

Bid A. To be delivered, all transportation charges paid, to the Supply Officer, Navy Yard, Puget Sound, (Bremerton), Wash., 100,000 pounds, Within 50 Days after date of contract or bureau order and the remainder at the rate of 50,000 pounds Every 15 Days thereafter until completion of contract.

Bid B. To be delivered f. o. b. cars or on wharf at or near contractor's works _____ pounds Within _____ Days after date of contract or bureau order, and the remainder at the rate of _____ pounds Every _____ Days thereafter until completion of contract.

Bidder shall insert below the actual f. o. b. point.

Bidders must insert in the above blank spaces the quantity proposed to be furnished as initial delivery, and also the rate

and shortest time in which deliveries will be made. Bidders are requested to estimate this time carefully.

	Bid A—Deliver at Navy Yard, Pudget Sound, (Bremerton), Wash.			Bid B—F. o. b. cars on wharf at	
	Pounds (about)	Unit price (per pound)	Total	Unit price (per pound)	Total
1. Rice	200,000	0.0473	$9,460.00	.....	.....

Name of packer (not the dealer) Standard Rice Company, Inc.
Address, Houston, Texas.
Approximate shipping weight, 101-1/4 lbs. Gross per bag.
Volume in cubic feet ready for shipment, approximately 2 cubic ft. per 100 lb. bag.
For specifications and general conditions see front page of this schedule.
Do not fail to execute and forward standard form No. 31 (Navy edition) with this bid.

(5-page schedule, 8/28/35–MAK)
(S–59916—Page 5)

In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA,
By ——— ———, *Purchasing Officer,*
Bureau of Supplies and Accounts, Navy Department.
(Official Title).

Two witnesses:
CHAS. H. SHEA.
F. M. SEELEY.

STANDARD RICE COMPANY, INC.,
Contractor,
W. K. MORROW, *President,*
Houston, Texas.
(Business Address).

38 I, F. A. Farda, certify that I am the Secretary of the corporation named as contractor herein; that W. K. Morrow who signed this contract on behalf of the contractor, was then president of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL] F. A. FARDA.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, _____, who signed this contract for the _____, had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

_____
Contracting Officer.

STANDARD GOVERNMENT FORM OF PERFORMANCE BOND

(As modified for use by the Navy Department)

(CONSTRUCTION OR SUPPLY)

Know all Men by these Presents, That we, Standard Rice Company, Inc., as Principal and W. K. Morrow and E. W. Gruendler as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of Six thousand eight hundred dollars lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated November 13th, 1935.

Now therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said
39 contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract, and any such authorized extension or modification thereof then, this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof, the above-bounden parties have executed this instrument under their several seals this 13th day of November, 1935, the name and corporate seal of each corporate party

being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

STANDARD RICE COMPANY,
Per W. K. MORROW. (Principal.) [SEAL]
W. K. MORROW. (Surety.) [SEAL]
A. W. GRUENDLER. (Surety.) [SEAL]

In presence of—
CHAS. H. SHEA.
F. M. SEELEY.

The rate of premium on this bond is ------ per thousand.
Total amount of premium charged, $------
(The above must be filled in by corporate surety.)
If individual sureties sign the above bond the Affidavits and Certificates on the Appended Sheet must be executed.

40 *Exhibit D to petition.*

NOTICE OF SETTLEMENT OF CLAIM

GENERAL ACCOUNTING OFFICE

Certificate 0455908.
Claim No. 0280086.

WASHINGTON, D. C., *July 30, 1937.*

Treas.

Check to issue as noted below:

STANDARD RICE COMPANY, INCORPORATED,
Post Office Drawer 2731, Houston, Texas.

I have certified that there is due you from the United States, payable from the appropriation(s) indicated, the sum of Two Thousand Three Hundred Thirty-four and 23/100 Dollars $2,334.23) on account of payment of income tax overassessed for the taxable year ended July 31, 1935, certificate of overassessment Number 1408269, as listed on supplemental schedule No. IT-59672, dated April 5, 1937.

2080903 Refunding Internal Revenue Collections, 1938 and Prior Years

Check to issue:
Treasurer of the United States for deposit to the credit of the appropriation: "17-0806 Naval Supply Account Fund."

This action is taken to effect partial collection of the indebtedness of Standard Rice Company, Inc., under Contract No.

Nos–45097, dated November 13, 1935, described herein resulting from overpayments consisting of the amount of processing tax included in the price of supplies paid for on the described vouchers but which, as indicated by the record, has not been paid by the contractor to the United States.

41 The contract involved in this indebtedness contains the following provision:

(See attached sheets.)

R. N. ELLIOTT,
Acting Comptroller General of the United States.
By J. H. ROE.

To claimant (s):
(Division of Disbursement.)

NOTE.—If this settlement is believed to be incorrect in any particular and the matters relied upon by claimant to support such view are clearly stated in a request for review filed with the Comptroller General of the United States at Washington, D. C., within one year from the date hereof, the settlement will thereupon be reviewed under his personal supervision. The inclosed check should not be cashed if its amount includes any item upon which review is requested, but unindorsed should accompany the request for review.

"Prices bid herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item."

Pursuant to the provisions of the Agricultural Adjustment Act, approved May 12, 1933, as amended, Rice Regulations, Series 1, No. 1, made by the Secretary of Agriculture and approved by the President on March 30, 1935, establishing the rate of processing tax imposed on the first domestic processing of rice and the conversion factor of percentage of such rate found necessary to determine the processing tax imposed on a particular product obtained from rice, effective April 1, 1935, as supplemented, revised, and, in part, superseded by regulations made by the Acting Secretary of Agriculture with the approval of the President, dated July 31, 1935, Treasury Decision No. 4586, was issued

42 by the Commissioner of Internal Revenue and approved by the Acting Secretary of the Treasury on September 9, 1935, establishing the rate of processing tax per pound on products obtained from rice effective on and after August 1, 1935.

The evidence of record indicates that the United States did not collect the amount of processing tax imposed by Congress on the items furnished under the described contract, and as a result thereof, under the contract provision quoted herein, after September 1935, the last month covered by full payment of processing taxes by Standard Rice Company, Inc., the United States was obligated to pay, as the contract price, only the bid price less the amount of processing tax included therein. However, payment has been made at the bid price, as hereinafter described, under this contract, for supplies furnished after September 1935, resulting in an overpayment of $8,479.60, computed as follows:

Contract No. NOs–45097, dated November 13, 1935.

Contractor and shipper: Standard Rice Company, Inc., Houston, Texas. Vouchers Nos. 40638, 44141, 44142, 50181, 50182, 50183, and 59487, December 1935 and January, February, March, 1936, accounts of W. N. Hughes.

Invoice Nos. 1152, 1216, 1215, 1214, 1217, 1335, dated November 29, December 10, 12, and 21, 1935, respectively.

Item	Weight delivered	Weight taxable	Tax rate per pound	Total tax
Rice	584,800	584,800	0.0145	$8,479.60
Total tax included in bid price and deductible under above contract				8,479.60

The amount of $2,334.23 having been set-off against the indebtedness of $8,479.60, as explained above, there remains due the United States under the Contract No. NOs–45097, supra, a balance of $6,145.37. Remittance of this amount should be made promptly to this office by bank draft or certified check made payable to "The United States."

43 *Exhibit E to petition*

NOTICE OF SETTLEMENT OF CLAIM

GENERAL ACCOUNTING OFFICE,
Washington, D. C., January 10, 1938.

In reply refer to
Certificate No. US.–4738–Navy,
Navy Settlements and Claims,
United States Claim No. COL–0280086.

Debtor:
STANDARD RICE COMPANY,
Post Office Drawer 2731, Houston, Texas.

The claim(s) of the United States for the balance due under contract No. NOs–45097, dated November 13, 1935, or $6,145.37.

representing the difference between the entire overpayment under such contract of $8,479.60, and $2,334.23, the amount collected by Certificate No. 0455908, dated July 30, 1937, which overpayment resulted from the fact that (1) this contract contains a tax clause as follows:

"Prices bid herein include any federal tax heretofore imposed by the Congress and made applicable to the material on this bid Any sales tax, duties, imposts, revenues excise, or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item."

(2) that no payment was made by the contractor to the United States of the amount of processing tax imposed by Congress on the supplies furnished and the legal liability for payment thereof has been removed by decision of the Supreme Court in United States v. Butler, 297 U. S. 1, and (3) that payment was
44 made at the bid price for all supplies delivered under the named contract. The indebtedness, an amount equivalent to the processing tax included in the bid price of supplies furnished, is computed as follows:

Contract No. NOs-45097, dated November 13, 1935:

Vouchers Nos. 40638, 44141, 44142, 50181, 50182, 50183, and 59487, December 1935 and January, February, March, 1936, accounts of W. N. Hughes.

Invoices Nos. 1152, 1216, 1215, 1214, 1217, 1335, dated November 29, December 10, 12, and 21, 1935, respectively.

Item	No. of lbs.	Tax per pound	Total tax
Rice	584,800	$.0145	$8,479.60
Less amount collected by Certificate of Settlement No. 0455908, dated July 30, 1937			2,334.23
Total amount due the United States			6,145.37

has (have) been settled and the sum of Six Thousand One Hundred Forty-five dollars and thirty-seven cents has been found due the United States per above certificate number. The amount due should be remitted to this office promptly, by check, draft, or money order payable to the "United States."

R. N. ELLIOTT,
Acting Comptroller General of the United States,
By W. J. MCCARTHY.

$6,145.37.

NOTE.—If a debtor desires a review of this settlement, or any item thereof, application should be filed, with a statement of the

reasons therefor, within one year from the date hereof, in the Division of Law, Office of the Comptroller General.

45 *Exhibit F to petition*

General Accounting Office—Claims Division
Washington

SETTLEMENT OF CLAIM

APRIL 24, 1941.

No. 0280086 (3).
STANDARD RICE COMPANY, INC.
Post Office Drawer 2731,
Houston, Texas.

Your claim has been examined and action thereon has been taken as more fully explained in the following statement.

If an amount is indicated as payable, this should be retained to identify check which will issue in due course, unless otherwise advised.

Statement of Settlement:

Claimed	$
Exception(s)	
Allowed	

COMPTROLLER GENERAL OF THE
UNITED STATES.
By F. A. SHUMAKER,
Claims Reviewer.

Claim for $6,145.37, representing refund of income tax listed on Supplemental Schedule No. IT-74630, dated December 28, 1940, overassessed for the taxable year 1938, certificate No. 2544993, is hereby allowed in full and applied in liquidation of claimant's indebtedness to the United States in the amount of $6,145.37, as hereinafter stated.

Separate check in the amount of $6,145.37 will issue to the Treasurer of the United States in due course for deposit to the credit of "17X0806 Naval Supply Account Fund" to effect liquidation of the indebtedness of Standard Rice Company, Inc., to the United States as set out in detail on certificate of Settlement No. US-4738-Navy, dated January 10, 1938.

47 *General traverse*

Filed December 11, 1941

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies

each and every allegation therein contained; and asks judgment that the petition be dismissed.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

FKD.

Argument and submission of case

On December 7, 1943, the case was argued and submitted on merits by Mr. Milton K. Eckert for plaintiff and by Mrs. Elizabeth B. Davis for defendant.

49 *Special findings of fact, conclusion of law and opinion of the court by Madden, J.*

Filed February 7, 1944.

Mr. Milton K. Eckert for the plaintiff. Mr. John C. White was on the briefs.

Mrs. Elizabeth B. Davis, with whom was Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Messrs. Robert N. Anderson and Fred K. Dyar were on the brief.

This case having been heard by the Court of Claims, the court, upon a stipulation of the parties, makes the following

Special findings of fact

1. Plaintiff, Standard Rice Company, Inc., is a corporation organized and existing under the laws of the State of Texas, having its principal office in Houston, Texas, and at all times mentioned herein was engaged in the business of milling rice for sale to various buyers, including the United States.

2. Each sum hereinafter stated to have been paid by plaintiff was paid to the Collector of Internal Revenue for the First District of Texas and was thereafter deposited by him with the Treasurer of the United States in the usual course of business.

3. October 15, 1935, plaintiff filed with the Collector of Internal Revenue for the First Texas District, its federal income tax return for the fiscal year ended July 31, 1935, disclosing a tax due of $25,502.43, which amount plaintiff paid to the Collector in four equal installments, one each on October 15, 1935, January 15, 1936, April 15, 1936, and July 15, 1936.

50 4. Thereafter, one of the field agents of the Commissioner of Internal Revenue audited plaintiff's income tax return for the fiscal year ended July 31, 1935, and determined that plaintiff had made an overpayment in income tax for that year in the amount of $2,334.23. In due course, the Commissioner of Internal Revenue caused a certificate of overassessment No. 1408269 to be issued showing that this sum was owing to plaintiff. A copy of this certificate is attached to the petition herein as Exhibit A, and is incorporated herein by reference.

5. Payment not having been made on the overassessment, for reasons set forth in finding 15, plaintiff, on June 13, 1938, filed with the Collector of Internal Revenue for the First District of Texas its claim for refund of said sum of $2,334.23, being the overpayment of income taxes for the fiscal year ended July 31, 1935. Plaintiff has not received notice from the Commissioner of Internal Revenue by registered mail, or otherwise, of the disallowance of such claim for refund, or of any part thereof, but was advised by the Commissioner, by letter dated September 20, 1938, that in view of the fact that the refund of income tax had been withheld by the Comptroller General in connection with plaintiff's alleged indebtedness to the United States for processing taxes, the claim had been forwarded to that official for consideration and appropriate action.

6. October 15, 1938, plaintiff filed with the Collector of Internal Revenue for the First Texas District its federal income tax return for the fiscal year ended July 31, 1938, disclosing a tax due of $25,677.99, which amount plaintiff paid to the Collector, in four installments, one each on October 15, 1938, and January 15, April 15, and July 15, 1939.

7. October 13, 1939, plaintiff filed claim for refund for the tax for the fiscal year ended July 31, 1938, in the amount of $25,677.99, with the Collector of Internal Revenue for the First Texas District. This claim was based upon the ground that instead of having a net taxable income for the fiscal year ended July 31, 1938, plaintiff had sustained a net loss for that year, and that consequently the income tax had been erroneously and illegally paid and collected. Thereafter, field agents of the Commissioner of Internal Revenue audited plaintiff's income tax return for the year in question and determined that there had, in fact, been an overpayment by
51 plaintiff of tax in the amount claimed. In due course, the Commissioner of Internal Revenue caused certificate of overassessment No. 2544993 to be issued showing that this sum, $25,677.99, was owing to plaintiff. A copy of this certificate of overassessment is attached to the petition herein as Exhibit B, and is incorporated herein by reference.

8. February 6, 1941, plaintiff received a partial refund from the United States of the overpayment of income tax for the year ended July 31, 1938, such partial payment amounting to $19,532.62, plus interest thereon in the amount of $2,018.13. Refund of the balance of $6,145.37 has not been made, for the reasons set forth in finding 16.

9. Since the filing of the claim for refund for $25,677.99 on account of overpayment of income tax for the fiscal year ended July 31, 1938, mentioned in finding 7, plaintiff has not received notice from the Commissioner of Internal Revenue by registered

mail or otherwise, of the disallowance of such claim for refund or any part thereof.

10. November 13, 1935, plaintiff entered into a contract with the defendant, being contract No. NOs-45097 a copy of which is attached to the petition herein as Exhibit C, and is made a part hereof by reference, under which plaintiff agreed to supply rice to the Navy Department at the bid prices specified in the contract, a typical price provision of which reads as follows:

Item	Pounds (about)	Unit price (per pound)	Total
1. Rice	200,000	0.046	$13,340.00

11. The contract contained, in schedule 5916, the following provision:

"Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item."

12. Under the terms of the contract, plaintiff delivered to the United States 584,800 pounds of milled rice, and received full payment from the United States, in accordance with the terms of the contract in December 1935, and January, February, and March 1936.

52 13. Plaintiff, as the first domestic processor of rice, paid the processing taxes imposed by the Agricultural Adjustment Act of May 12, 1933, as amended, from April 1, 1935, to September 20, 1935. Before paying the processing tax on the rice processed for the month of October 1935, plaintiff applied to, and obtained from, the United States District Court for the Western District of Texas (No. 577 in Equity) an injunction against the Collector of Internal Revenue, prohibiting the collection from it of any further processing taxes, and no processing taxes were paid by the plaintiff after the month of September 1935. Plaintiff particularly did not pay to the United States or any of its officers processing taxes imposed upon it under the authority of the Agricultural Adjustment Act, as amended, on the supplies furnished to the United States under Contract NOs-45097, amounting to the sum of $8,479.60.

14. The Comptroller General, on behalf of the United States, as more fully set forth in finding 15, asserted a claim against plain-

tiff for $8,479.60 (being United States claim No. 0280086), on the theory that there had been an overpayment by the United States on contract No. NOs–45097, since plaintiff had failed to pay the processing tax on the rice delivered under the contract. In computing the amounts claimed, the Comptroller General used $.0145 per pound of milled or clean rice as the equivalent of the processing tax of $.01 per pound of rough rice. This conversion factor of $.0145 per pound was established by Regulations made, pursuant to the Agricultural Adjustment Act, by the Secretary of Agriculture, with the approval of the President, dated March 30, 1935, as revised and, in part, superseded by, Regulations made by the Acting Secretary of Agriculture, with the approval of the President, dated July 31, 1935, Treasury Decision 4586. The amount of $8,479.60 claimed by the Comptroller General was computed as follows:

Item	Quantity, pounds	Tax rate per lb.	Total tax
Rice	584,800	0.0145	$8,479.60

15. As stated in finding 5, payment of $2,334.23 under certificate of overassessment No. 1408269, issued by the Commissioner of Internal Revenue on account of plaintiff's overpayment of income taxes for the fiscal year ended July 31, 1935, was withheld by the Comptroller General, who, on July 30, 1937, and January 10, 1938, issued his Notices of Settlement of Claim of the General Accounting Office (certificate No. 0455908, dated July 30, 1937, and certificate No. US–4738–Navy, dated January 10, 1938; claim No. 0280086), in which he certified that $2,334.23 was due to plaintiff on account of income tax overassessed for the taxable year ended July 31, 1935, but that this sum had been credited by him against the alleged indebtedness of $8,479.60 under contract No. NOs–45097, leaving a balance on said indebtedness of $6,145.37. Copies of these Notices of Settlement of Claim of the General Accounting Office are attached to the petition herein as Exhibits D and E, and are incorporated herein by reference.

16. As stated in finding 8, payment of $6,145.37 under certificate of overassessment No. 2544993, issued by the Commissioner of Internal Revenue for $25,677.99 on account of plaintiff's overpayment of income taxes for the fiscal year ended July 31, 1938, was withheld by the Comptroller General who, on April 24, 1941, issued his Notice of Settlement of Claim of the General Accounting Office (claim No. 0280086 (3)), in which he stated that $6,145.37, representing refund to plaintiff of income tax overassessed for the taxable year ended July 31, 1938, was allowed in full, but that this

sum was being credited by him against the balance of $6,145.37 of the alleged indebtedness under contract No. NOs-45097. Copy of this Notice of Settlement of Claim of the General Accounting Office is attached to the petition herein as Exhibit F, and is incorporated herein by reference.

17. On or about October 28, 1939, plaintiff paid to the Collector of Internal Revenue for the First Texas District $72,072.30 in unjust enrichment taxes, imposed by Title III of the Revenue Act of 1936, on account of its having been relieved of the payment of processing taxes as set out in finding 13 above. This unjust enrichment tax was computed and assessed upon the basis of the inclusion of units involved in the claim of the Comptroller General. If those units had been excluded, the correct unjust enrichment tax would have been $70,365.71, a difference of $1,706.59.

18. No part of the overpayments of income tax for the fiscal years ended July 31, 1935, and July 31, 1938, which were withheld by the Comptroller General, as shown in findings 15 and 16, has ever been refunded, or repaid, except by credits made by
54 the Comptroller General against the alleged indebtedness of plaintiff to the United States as above set forth.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a matter of law that the plaintiff is entitled to recover the sum of $8,479.60 with interest as provided by law.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of eight thousand, four hundred seventy-nine dollars and sixty cents ($8,479.60), with interest thereon as provided by law.

Opinion

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, whose business was milling rice, made, on November 13, 1935, a contract to sell a large quantity of milled rice to the Government, for the Navy. The contract contained the following paragraph:

"Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoice as a separate item."

The plaintiff, as the first domestic processor, paid the processing taxes, imposed by the Agricultural Adjustment Act, for the rice which it milled from April 1, 1935, to September 20, 1935. It obtained an injunction against the further collection of the taxes, and paid no tax for rice milled after September 1935. It milled the rice, which it delivered under its contract with the Government, after September, and paid no processing taxes on it. The taxes would have been, if paid, $8,479.60. In January 1936, the Supreme Court of the United States held the Agricultural Adjustment Act unconstitutional. United States v. Butler, 297 U. S. 1. The taxes were, therefore, never collected, as taxes.

For the years 1935 and 1938, the plaintiff overpaid its in-
55 come taxes by some $28,000. The Government conceded the overpayment, but the Comptroller General, asserting that the plaintiff owed the Government $8,479.60, the equivalent of what the processing taxes would have been on the rice contract, withheld that amount from the plaintiff's income tax refund. The plaintiff, denying its liability for the processing taxes or their equivalent, sues for the amount withheld.

As appears in finding 17, the plaintiff paid a large sum in 1939 as unjust enrichment taxes under Title III of the Revenue Act of 1936, apparently because it had collected from various purchasers processing taxes which it had not itself paid. Included in the transactions upon which these taxes were based were some units of the sales to the United States, as to which the Comptroller General held that the plaintiff owed the United States the amount of the unpaid processing taxes, which amount that official collected for the United States by the set-off complained of in this suit. The amount of the unjust enrichment taxes so collected which was attributable to the sales of rice to the United States, here in question, was $1,709.59. The plaintiff claims, in the alternative, that it should recover at least that amount, and the Government concedes the validity of that claim.

The Government justifies the Comptroller General's action in collecting from the plaintiff by set-off the entire amount which the plaintiff would have had to pay, as taxes, if the Supreme Court had not held the Agricultural Adjustment Act unconstitutional, on the ground that the Government and the plaintiff, when they made the contract for the milled rice, contemplated that the tax would be paid, and included the tax in the contract price. The Government's theory seems to be that this contemplation, in the circumstances, rose to the dignity of an implied term of the contract to the effect that if the taxes were not paid, the contract price would be correspondingly reduced. It relies on the case of United States v.

Kansas Flour Corporation, 314 U. S. 212, where the Supreme Court held that, under a contract differing somewhat from the plaintiff's contract, the United States could recover the amount of the tax in a quasi-contract suit, under state law, to prevent unjust enrichment. In that case the contract provided that if any sales tax, processing tax or other taxes or charges "are imposed or changed by the Congress after the date set for the
56 opening of the bid * * * and are paid to the Government by the contractor * * * then the prices named in this contract will be increased or decreased accordingly * * *"

The Government recognizes, of course, that the language of the contract involved in the Kansas Flour Corporation case was much more pointed, since it had in it a direct "up and down" clause relating the contract price to the amount of the tax. If, in that case, Congress had reduced or repealed the tax, the Government would have been entitled, by the very letter of the contract, to get back a corresponding part of the price paid. Whatever difficulties the case presented were caused by the fact that the contractor there had been relieved from paying the tax, as a tax, not by a repeal by Congress, but by the tax statute becoming unenforceable because of the Supreme Court's decision in United States v. Butler, supra. The Supreme Court was at pains to point out, in the Kansas Flour Corporation case, that Congress had, after the Butler decision, recognized, in legislation, the invalidity of the processing tax and had enacted the unjust enrichment tax, and that therefore there had been a change, by Congress, within the meaning of the contract there in question.

Because of the difference in the language of the two contracts, the Kansas Flour Corporation case, supra, is not a direct precedent against the plaintiff in this case. However, the Government points out that the Supreme Court used the following language, and urges that the language is applicable to the plaintiff's contract. The court said:

"In the case of private contracts, the vendees purchase for resale and the tax burden assumed is passed on to their customers. The fact that the processor—the vendor, is protected from the payment of the tax by injunction does not reduce the price to the vendee or to purchasers from him. The courts will not permit the unjust enrichment involved in recovery by the vendee of the amount of tax which he has passed on to his customers. In the contracts in question, the Government did not buy for resale. Unless it received the tax it suffered a definite disadvantage. Its purpose, as shown by the contracts, was to balance the tax element in the price paid with the tax collected. The Government, which could not pass

on the tax on resale, was thus protected, not against a fall in
57 the market price but against a loss in its tax revenues. In cases of private sales, the processor's injunction against collection of the tax, as held by the cases cited, worked no harm to his vendee. A similar injunction in the case of Government contracts, would leave the price to the Government at the higher level reflecting the tax and deprive the Government of the reciprocal benefit flowing from collection of the tax."

We are persuaded that there is a vital difference between the plaintiff's contract and that in the Kansas Flour Corporation case. In the Kansas case the processing tax was expressly mentioned, as the Supreme Court observes. In our case it is not mentioned by name, and there is no indication in the contract, or in any proved circumstance of the contract, that the parties had this tax in mind any more than they had tariff duties, for example, in mind. If Congress had reduced, or even repealed a tariff law applicable to rice, and if the plaintiff had thereupon imported rice and furnished it to the Government in fulfillment of its contract, we doubt whether the plaintiff would have been regarded as owing the amount of the tariff duty it would have had to pay, but for the repeal. Yet there would have been exactly as much reason for permitting the Government to sue for, or to offset the tariff duties of which the contractor was relieved, in that case as in the case of the processing tax.

We think that the language of the contract in the instant case does not express or imply an intention that the Government is to get, either as taxes or by offset or otherwise, the amount of any applicable federal tax which was in existence when the contract was made. We think the tax provision of the contract, which was drawn by the Government and whose ambiguities should therefore be resolved against the Government, may very well have been meant only to foreclose any argument as to whether federal taxes were payable upon federal purchases and the steps preparatory thereto. The statement that prices bid "include" specified things is customary in Government contracts, as to various named things which will, or may, have to be done to fulfill the contract. Presumably the bidder adds something to his bid to cover these things, whether they are certain or contingent. Yet it has never
58 been thought that if he gets the things that he must accomplish done cheaper, or escapes by good luck the expense of doing some or all of the contingent things, he should refund to the Government what it would have cost him to do them if costs had remained what they were when the contract was made, or if all the things that might have increased his costs had happened.

We think that, in general, the Government, as contractor, should be treated by the law as other contractors similarly circumstanced are treated.

The fact that the contract expressly provided that if new (or perhaps increased) federal taxes were levied on the materials, the Government would refund those taxes, seems to us to argue strongly that the reverse was not intended to be implied from the parties' silence.

We recognize that the Circuit Court of Appeals for the Tenth Circuit, in United States v. American Packing and Provision Co., 122 F. (2d) 445, treated contracts of the two types in the same way, and held with the Government as to both; and that the United States District Court for the District of Massachusetts, in Suncook Mills v. United States, 44 F. Supp. 744, held for the Government in a case involving a contract like the plaintiff's. We also recognize that the denial of certiorari by the Supreme Court in the American Packing case, supra, shortly after its decision in the Kansas Flour Corporation case, supra, may indicate that the language of the court in the Kansas Flour Corporation case was more broadly intended than we have supposed.

We conclude that the plaintiff is entitled to recover $8,479.60, with interest as provided by law.

It is so ordered.

WHITAKER, Judge; and LITTLETON, Judge, concur.

JONES, Judge; and WHALEY, Chief Justice, took no part in the decision of this case.

59 *Judgment of the Court*

February 7, 1944

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a matter of law that the plaintiff is entitled to recover the sum of $8,479.60 with interest as provided by law.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of eight thousand four hundred seventy-nine dollars and sixty cents ($8,479.60), with interest thereon as provided by law.

61 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1944

Supreme Court of the United States

Order allowing certiorari

(Filed June 12, 1944)

The petition herein for a writ of certiorari to the Court of Claims of the United States is granted and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE : 1944

No. 944 72

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES, PETITIONER

v.

STANDARD RICE COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

CITATIONS

584945—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 944

THE UNITED STATES, PETITIONER

v.

STANDARD RICE COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause on February 7, 1944.

OPINION BELOW

The opinion of the Court of Claims (R. 37–41) is reported in 53 F. Supp. 717.

JURISDICTION

The judgment of the Court of Claims was entered February 7, 1944 (R. 41). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Respondent agreed to sell rice to the United States under a contract which provided that prices paid included any federal tax heretofore imposed by Congress which was applicable to the material involved and that any tax "which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item." The United States paid respondent the full contract price on the rice delivered, but respondent did not pay any processing tax on the rice, due to the fact that the Agricultural Adjustment Act was declared unconstitutional.

The question involved is whether the price under the contract should be reduced by the amount of unpaid processing tax.

STATUTES INVOLVED

Budget and Accounting Act, 1921, c. 18, 42 Stat. 20:

> SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:
>
> "SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in

the General Accounting Office." (31 U. S. C., Sec. 71.)

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended:

SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; * * *. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized un-

der section 8 which are in effect are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture * * * (7 U. S. C., Sec. 609).

MISCELLANEOUS

SEC. 10. * * *

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

* * * * * *

(7 U. S. C., Sec. 610.)

COMMODITIES

SEC. 11. As used in this title, the term "basic agricultural commodity" means wheat, rye, flax, barley, cotton, field corn, grain sorghums, hogs, cattle, rice, potatoes, tobacco, peanuts, sugar beets and sugarcane, and milk and its products, and any regional or market classification, type, or grade thereof; * * * (7 U. S. C., Sec. 611).

STATEMENT

The special findings of fact of the Court of Claims (R. 33–37) may be summarized as follows:

On November 13, 1935, respondent, a corporation engaged in the business of milling rice for sale, entered into a contract with the United States under which respondent agreed to supply rice to the Navy Department at the bid prices specified in the contract. The contract contained the following provision (R. 35):

> Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item.

In accordance with the terms of the contract, the respondent delivered to the United States 584,800 pounds of milled rice and received full payment from the United States in accordance with the terms of the contract (R. 36).

Respondent, as the first domestic processor of rice, paid the processing taxes imposed by the Agricultural Adjustment Act from April 1, 1935, to September 20, 1935. Before paying the processing tax on the rice processed for the month of October, 1935, respondent obtained an injunction against the Collector of Internal Revenue prohibiting the collection from it of any further processing taxes. Respondent did not pay to the United States processing taxes on the

supplies furnished to the United States under the contract here involved, such taxes amounting to $8,479.60. (R. 35.)

The Comptroller General asserted claim against respondent for the above amount of $8,479.60 on the theory that there had been an overpayment by the United States on the contract, since respondent had failed to pay the processing tax on the rice delivered under the contract (R. 35–36). Overassessments of income tax were determined in favor of the respondent for the fiscal years ending July 31, 1935, and July 31, 1938. Of these overpayments the amount of $8,479.60 was not refunded to respondent but was credited by the Comptroller General against the indebtedness for processing taxes. (R. 34, 36–37.) Respondent paid to the Collector of Internal Revenue for the First Texas District unjust enrichment taxes on account of its having been relieved of the payment of the processing taxes. This unjust enrichment tax was computed and assessed upon the basis of the inclusion of units involved in the claim of the Comptroller General. If those units had been excluded, the unjust enrichment tax would have been reduced by the amount of $1,706.59. (R. 37.)[1]

[1] The Government conceded in the court below that in view of certain language in the case of *United States* v. *Kansas Flour Corp.*, 314 U. S. 212, 216, if respondent is required to reduce its price by the amount of the unpaid processing tax, it is not subject to the unjust enrichment tax on these transactions.

After the refusal of the Comptroller General to refund the amount of the processing taxes, this suit was brought in the Court of Claims; and that court, on February 7, 1944, entered judgment in favor of the respondent for $8,479.60, with interest (R. 41).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Comptroller General was not entitled to credit, against amounts due for overpayments of taxes, amounts paid to respondent under the contract in reimbursement for processing tax which the respondent never paid.

2. In failing and refusing to hold that the contract provision that the price included taxes then in effect contemplated that the vendor would pay the processing taxes to the Government.

3. In failing to enter judgment for the United States and dismissing the petition.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below to the effect that the Government is not entitled to the amount of the processing taxes included in the contract price, but not actually paid by the respondent, is in direct conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445, certiorari denied, 314 U. S. 694. *The American Packing & Provision Co.* case in-

volved two types of contract, one type being almost identical with the contract in this case and the other type being similar to those involved in the case of *United States* v. *Kansas Flour Corp.*, 314 U. S. 212. This latter type of contract contained a so-called "up and down" provision, i. e., that if taxes were thereafter imposed or changed by Congress then the prices named in the contract would be increased or decreased accordingly. The Circuit Court of Appeals made no distinction between the two types of contract but decided in favor of the Government on the basis of unjust enrichment rather than on the basis of the specific language of the contracts. That court held that since the price paid by the Government included taxes which the vendor did not pay, the vendor received a benefit from the Government which in justice and good conscience should be returned. To the same effect is the decision of the District Court for the District of Massachusetts in *Suncook Mills* v. *United States*, 44 F. Supp. 744.

2. The decision below is in conflict with the principle of the *Kansas Flour Corp.* case. That case, as already stated, involved contracts similar to the second type referred to in the *American Packing & Provision Co.* case. It is true that this Court discussed this "change" provision and held that recognition by Congress of the invalidation of the Agricultural Adjustment Act by the legislation embodied in the 1936 Revenue Act

amounted to a "change by the Congress." However, we submit that the decision of this Court did not hinge on the fact that the contracts contained such provisions but that that decision is broad enough to cover the type of contract involved in the instant case. We believe the real basis of that decision to have been that the parties to the contract contemplated that the vendor would have to pay the processing tax and the sale price was *pro tanto* offset by the amount of the tax (p. 214). With regard to the contention advanced in that case by the vendor that the Government was not entitled to maintain its set-off because the contract contained no specific undertaking by the vendor that it would pay the tax, this Court pointed out that since the Government, as distinguished from most private contractors, did not buy for resale, it would suffer a definite disadvantage unless it received the taxes. It then, in a footnote (p. 216), referred to the case of *United States* v. *American Packing & Provision Co., supra,* stating that in that case—

> the Government was held entitled to maintain a set-off asserted under conditions like those here involved on the ground that the vendor had received money from the Government which in equity and good conscience it should repay.

Petition for certiorari in the *American Packing & Provision Co.* case was pending while the *Kansas Flour Corp.* case was under consideration.

The Government requested that action upon the petition should be postponed until the final decision in the *Kansas Flour Corp.* case, and certiorari was denied one week after the final decision in the *Kansas Flour* case. This Court moreover referred to the *American Packing & Provision Co.* case in a footnote in the first part of its opinion (footnote 2, p. 214) as among the number of pending cases involving the same problem as the *Kansas Flour* case, and therefore justifying certiorari in the latter case. We believe that all this is indicative of the fact that the principle enunciated in the *Kansas Flour* case should be applied here.[2]

3. The question is of considerable importance, as we are advised by the Comptroller General that there are several hundred contracts which involve this question. The conflict between the decision of the court below and that of the Tenth Circuit should be resolved in order to avoid confusion and continued litigation.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY, *Solicitor General.*

APRIL 1944.

[2] The *Suncook* case was decided after the *Kansas Flour Corp.* case and the District Court was of the opinion that that decision was applicable to contracts containing provisions similar to the one in this case.

U. S. GOVERNMENT PRINTING OFFICE: 1944

No. 72

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES, PETITIONER,

v.

STANDARD RICE COMPANY, INC.

ON WRIT OF CERTORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court below (R. 37–41) is reported in 53 F. Supp. 717.

JURISDICTION

The judgment of the Court of Claims was entered on February 7, 1944 (R. 41). The petition for a writ of certiorari was filed on April 28, 1944, and was granted on June 12, 1944 (R. 42). The jurisdiction of this Court rests on Section 3 (b) of the Act of February 18, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

In November 1935, respondent agreed to sell rice to the United States under a contract which

provided that prices paid included any federal tax theretofore imposed by Congress which was applicable to the material involved and that any tax "which may hereafter [the date set for the opening of this bid] be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item." The federal processing tax on rice had become effective in April 1935. The United States paid respondent the full contract price on the rice delivered, but respondent did not pay any processing tax on the rice, due to the fact that the Agricultural Adjustment Act was declared unconstitutional.

The questions involved are: (1) Whether the Government is entitled to an offset against an overpayment of income taxes for a reduction in the contract prices equal to the amount of unpaid processing taxes, or (2) whether, upon the theory of money paid by mutual mistake, it may offset a sum equal to the unpaid processing tax, less in either case the increase in the unjust enrichment tax attributable to the inclusion of the transactions.

STATUTES INVOLVED

Budget and Accounting Act, 1921, c. 18, 42 Stat. 20:

> SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:
>
> "SEC. 236. All claims and demands whatever by the Government of the United

States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." (31 U. S. C. Sec. 71.)

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended:

PROCESSING TAX

SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; except that * * * in the case of rice * * * the processing tax shall be in effect on and after April 1, 1935. * * * The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the

date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized under section 8 which are in effect are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture; * * *.
(7 U. S. C. Sec. 609.)

COMMODITIES

SEC. 11. As used in this title, the term "basic agricultural commodity" means * * * rice, * * *, and any regional or market classification, type, or grade thereof; * * *.
(7 U. S. C. Sec. 611.)

STATEMENT

The special findings of fact of the Court of Claims (R. 33–37) may be summarized as follows:

On November 13, 1935, respondent, a corporation engaged in the business of milling rice for sale, entered into a contract with the United States under which respondent agreed to supply rice to the Navy Department at the bid prices

specified in the contract (R. 35). The contract contained the following provision (*ibid.*):

> Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item.

Under the terms of the contract, the respondent delivered to the United States 584,800 pounds of milled rice and received full payment from the United States in accordance with the terms of the contract (R. 35).

Respondent, as the first domestic processor of rice, paid the processing taxes imposed as of April 1, 1935, by the Agricultural Adjustment Act (*supra,* pp. 3–4) from April 1, 1935, to September 20, 1935. Before paying the processing tax on the rice processed for the month of October 1935, respondent obtained an injunction against the Collector of Internal Revenue prohibiting the collection from it of any further processing taxes. Respondent did not pay to the United States processing taxes on the supplies furnished to the United States under the contract here involved, such taxes amounting to $8,479.60. (R. 35.)

The Comptroller General, on behalf of the United States, asserted a claim against respondent for the above amount of $8,479.60 on the theory that there had been an overpayment by the United States on the contract, since respondent had failed to pay the processing tax on the rice delivered under the contract (R. 35–36). Overassessments of income tax were determined in favor of the respondent for the fiscal years ending July 31, 1935, and July 31, 1938. Of these overpayments, the amount of $8,479.60 was not refunded to respondent but was credited by the Comptroller General against the claim of the United States. (R. 34, 36–37.)

Respondent paid to the Collector of Internal Revenue for the First Texas District an unjust enrichment tax of $72,072.30 on account of its having been relieved of the payment of the processing taxes. This unjust enrichment tax was computed and assessed upon the basis of the inclusion of units involved in the claim of the Comptroller General. If those units had been excluded, the unjust enrichment tax would have been reduced by the amount of $1,706.59. (R. 37.)[1]

[1] The Government conceded in the court below that, as pointed out in *United States* v. *Kansas Flour Corp.*, 314 U. S. 212, 216, note 6, if respondent is required to reduce its price by the amount of the unpaid processing tax, it is not subject to the unjust enrichment tax on these transactions. See Sections 501 (b) (2) and (j) (4) of the Revenue Act of 1936 (26 U. S. C. Sec. 700 (b) (2) and (j) (4)).

After the refusal of the Comptroller General to refund the amount of $8,479.60, this suit was brought in the Court of Claims; and that court, on Febuary 7, 1944, entered judgment in favor of the respondent for $8,479.60, with interest (R. 41).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Comptroller General was not entitled to credit, against amounts due for overpayments of taxes, amounts paid to respondent under the contract in reimbursement for processing taxes which the respondent never paid.

2. In failing and refusing to hold that the contract provision that the price included taxes then in effect contemplated that the vendor would pay the processing taxes to the Government.

3. In failing to enter judgment for the United States.

SUMMARY OF ARGUMENT

A. The Government and the respondent agreed in the contract here involved that the prices included federal taxes theretofore imposed. Both parties assumed that the processing tax would be collectible and intended that the price should *pro tanto* be offset by the tax. The respondent did not pay the processing tax but collected the full amount of the contract price from the Govern-

ment. The Government is, therefore, entitled under the contract to recover the amount of the unpaid processing tax and is not required to refund so much of the respondent's overpayment of income taxes as equals such sum. It is true that in such a contract between private parties the vendee is usually not allowed to recover. However, this Court has held that this rule is not applicable when the Government is one of the parties to the contract. *United States* v. *Kansas Flour Corp.*, 314 U. S. 212. There is no difference between the purpose of the contract in this case and that of the contract in the *Kansas Flour* case.

B. In the alternative, the Government, upon the equitable theory of a payment of money by mutual mistake, should be permitted to offset against the respondent's claim an amount equal to the unpaid processing taxes, less the increase in the unjust enrichment tax attributable to the inclusion of the transactions here involved. The respondent has been unjustly enriched to that extent. Money disbursed erroneously by public officers may be recovered whether the error is one of fact or law. The vendor should not be allowed to be unjustly enriched by retaining the full contract price when it did not pay the processing taxes included in that price. The respondent may recover only to the extent that it is in equity and good conscience entitled to a refund.

ARGUMENT

THE UNITED STATES IS ENTITLED TO WITHHOLD THE AMOUNT OF THE UNPAID PROCESSING TAX

A. Under the contract here involved, the respondent agreed to sell rice to the United States. The contract expressly provided that (R. 35):

> Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item.

At the time this contract was entered into, the Agricultural Adjustment Act imposed processing taxes on rice. This tax was clearly a federal tax applicable to the material covered by the bid (see *United States v. Glenn L. Martin Co.*, 308 U. S. 62); the Act did not exempt vendors to the United States from the processing tax; and a Treasury Regulation required that they pay the tax. Treasury Regulations 81, Article 9, under the Agricultural Adjustment Act. Moreover, the amount of the tax was known.[2]

[2] The contract was executed on November 13, 1935 (R. 35). The tax was effective as of April 1, 1935, and was $.01 per pound of rough rice (Section 9 (b) (3), 7 U. S. C. Sec. 609

It thus seems clear that both the United States and the respondent contemplated payment of the processing tax, and as specifically stated in the contract, fixed the price to include the tax. Plainly, if the United States had not been thought entitled to collect the tax, the bid price would not have been acceptable. The price was accordingly designed to offset *pro tanto* the amount of the tax. The conclusion is reinforced by the second sentence of the contract quoted above (p. 9) which required the United States to pay an amount equal to any additional excise, sales or other tax that might subsequently be imposed by Congress on the material applicable to the bid and required that such amount should be billed as a separate item. No processing tax, however, was paid on the rice covered by the contract because of the decision in *United States* v. *Butler,* 297 U. S. 1, holding the tax invalid, and because of the injunction the vendor secured prohibiting the collection of the processing tax; and there has in fact been no offset to the full contract price paid by the United States through the payment of the processing tax.

In *United States* v. *Kansas Flour Corp.,* 314 U. S. 212, this Court held that under the contracts involved there, the United States could offset

(b) (3)), and the conversion factor of $.0145 per pound of milled or clean rice as the equivalent of the processing tax of $.01 per pound of rough rice had been established by regulations made pursuant to the Agricultural Adjustment Act (R. 36).

amounts it paid as part of the contract price [3] to cover processing taxes which were allegedly to be paid by the vendor but which the vendor had not paid. The court below declined to follow the *Kansas Flour* case. It held that in general the Government, as contractor, should be treated by the law as other contractors similarly circumstanced would be treated and regarded the *Kansas Flour* case as turning on the particular language of the contracts there involved. It emphasized that the contract here (*supra*, p. 9) did not use the phrase "processing tax" and that while providing for an increase in price due to the imposition of new excises, it did not contain a so-called "up and down" provision stating that if taxes were thereafter imposed or changed by Con-

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[3] The tax clause of the contracts in the *Kansas Flour* case provided (314 U. S. at p. 213):

> Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

gress, then the prices named in the contract would be increased or decreased accordingly.

We do not construe the principle of the *Kansas Flour* case as being so limited. We understand that the Court held that if a contract between the vendor and the United States contemplates that the vendor will pay the processing tax and that the sale price is thus *pro tanto* offset by the amount of the tax, the Government is entitled to recover an amount equal to the tax when it is determined that the tax cannot be collected. It is true that the Court held that the recognition by Congress of the invalidation of the Agricultural Adjustment Act by the legislation embodied in the 1936 Revenue Act amounted to a "change by the Congress" within the meaning of the "up and down" clause and relied upon that clause, though not exclusively, in ascertaining the purpose and effect of the contract, but there is no intimation in the opinion that the same rule would not be applied where the same purpose to have the vendor pay the tax and be reimbursed *pro tanto* in the price is disclosed by other language. The respondents there had contended that the Government was not entitled to a setoff because the contracts contained no express undertaking that the vendor should pay the tax, and also had contended that a price adjustment was only required in case of a reduction of the tax by Congress as distinguished from its invalidation. They relied upon

decisions[4] holding that similar tax clauses in private contracts did not require an adjustment of the contract price as a result of the decision in *United States* v. *Butler*, 297 U. S. 1. However, the Court did not hold that there may be a departure from the rule applicable to similarly circumstanced private contractors only where the contract employs the language of the *Kansas Flour* contract. Rather, it was pointed out (314 U. S. at pp. 215–216) that those cases turned on the absence of an express provision respecting constitutional invalidity and upon the omission of the parties to provide for billing the tax separately, and it was held that such considerations are not applicable to Government contracts, where the purpose of the tax clause is different. The Court said (314 U. S. at pp. 216–217):

> In the case of private contracts, the vendees purchase for resale and the tax burden assumed is passed on to their customers. The fact that the processor—the vendor—is protected from the payment of the tax by injunction does not reduce the

[4] *Moundridge Milling Co.* v. *Cream of Wheat Corp.*, 105 F. 2d 366 (C. C. A. 10th); *Consolidated Flour Mills* v. *Ph. Orth Co.*, 114 F. 2d 898 (C. C. A. 7th); *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445 (C. C. A. 10th), certiorari denied, 314 U. S. 694; *City Baking Co.* v. *Cascade Milling & Elevator Co.*, 24 F. Supp. 950 (D. Mont.); *G. S. Johnson Co.* v. *N. Sauer Milling Co.*, 148 Kan. 861; *Sparks Milling Co.* v. *Powell*, 283 Ky. 669; *Crete Mills* v. *Smith Baking Co.*, 136 Neb. 448.

price to the vendee or to purchasers from him. The courts will not permit the unjust enrichment involved in recovery by the vendee of the amount of tax which he has passed on to his customers.[7] In the contracts in question, the Government did not buy for resale. Unless it received the tax it suffered a definite disadvantage.[8] Its purpose, as shown by the contracts, was to balance the tax element in the price paid with the tax collected.[9] The Government, which could not pass on the tax on resale, was thus protected, not against a fall in the market price but against a loss in its tax revenues. In cases of private sales, the processor's injunction against collection of the tax, as held by the cases cited, worked no harm to his vendee. A similar injunction, in the case of Government contracts, would leave the price to the Government at the higher level reflecting the tax and deprive the Government of the reciprocal benefit flowing from collection of the tax.

[7] In *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445, the Government was held entitled to maintain a set-off asserted under conditions like those here involved on the ground that the vendor had received money from the Government which in equity and good conscience it should repay.

[8] Compare *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34, 36–37.

The considerations which led the Court to allow recovery in the *Kansas Flour* case are applicable to any case in which the contract between the

vendor and the Government contemplates that the vendor will pay the tax and fixes the price to include the tax with a purpose to balance the tax element in the price paid with the tax collected. Such a purpose may be found in other language than the exact language employed in the contracts involved in the *Kansas Flour* case. It is not material that the tax clause here lacks an "up and down" provision. See *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445 (C. C. A. 10th), certiorari denied, 314 U. S. 694, and *Suncook Mills* v. *United States*, 44 F. Supp. 744 (D. Mass.) in both of which cases recovery was allowed to the Government. A petition for a writ of certiorari in the *American Packing Co.* case was not denied until after the *Kansas Flour* case was decided, and the decision was twice cited in the *Kansas Flour* opinion. The *American Packing Co.* case involved a number of contracts, some similar to the one here involved and others containing an "up and down clause," but no distinction was made between the two classes[5] in reach-

[5] In its petition for certiorari in the *American Packing Co.* case (p. 5), the taxpayer referred this Court to the portion of the record [R. 27–29] in the Tenth Circuit containing the tax clauses involved.

In discussing the tax clauses, the Tenth Circuit remarked (122 F. 2d at p. 447):

> Each of the eighteen contracts contained what is commonly known as the Federal Tax Clause. Although all of the tax clauses are not identical in form and com-

ing the conclusion that recovery was allowable. The tax clause in the *Suncook Mills* case was identical in all material respects with the one here involved.

The purpose of the tax clause in all Government contracts dealing with commodities subject to processing tax is of necessity the same as the purpose of the tax clause in the *Kansas Flour* case. The parties here had the processing tax in mind, as the most obvious tax applicable to the material covered by the bid (cf. *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62); the price was stated to include any previously imposed federal tax applicable to the material; and provision was made for payment by the Government of any increased tax imposed. The amount of the tax was not buried in the composite price, for the amount was known (see p. 9, *supra*). The tax was to be paid to the United States as the tax collector, and the United States as a vendee not intending to

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position, the variations contained therein are immaterial to our consideration of the question presented. In substance they all provide that the bid price is a composite price and includes all taxes applicable to the materials and supplies furnished under the contract, with the further proviso that any additional tax imposed after the opening of the bids would be added to the purchase price, and paid by the Government as a separate item. Some of the contracts contained a provision that any change in the existing taxes, applicable to and paid by the vendor would increase or decrease the purchase price accordingly; if changed upward, the increase was to be paid by the Government as a separate item.

resell could not pass on to any other person the amount of the tax included in the price. *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445 (C. C. A. 10th), certiorari denied, 314 U. S. 694; *Suncook Mills* v. *United States*, 44 F. Supp. 744 (D. Mass.). Hence, when the parties stated that the bid price included the amount of any federal tax applicable to the material included in the bid, the purpose of the arrangement was to provide the vendor a margin of profit over the processing tax to be paid. This Court thus construed a similar provision in *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62. It is true that there the narrow question was whether taxes imposed by the Social Security Act, c. 531, 49 Stat. 620, were of the type for which the contract provided extra compensation. But in deciding that question, the Court was required to construe a federal tax clause in a Government contract, the first sentence of which is identical with the one here involved.[6] The Court there said (308 U. S. at p. 64):

> Obviously, the seller fixed its stipulated prices so as to provide a margin of profit

[6] The tax clause in the *Glenn L. Martin Co.* case provided (308 U. S. at p. 63):

> It is expressly understood and agreed to by and between the parties hereto that the prices herein stipulated include any Federal Tax heretofore imposed by the Congress which is applicable to the material called for under the terms of this contract. If any sales tax, processing

> over federal taxes for which it might at the time of the contract be responsible on the particular "material" sold. This clearly appears from the governing provision's opening declaration that "the prices herein stipulated include any Federal tax heretofore imposed by Congress which is applicable to the material called for under the terms of this contract." * * *

We maintain that this construction is controlling here, and since the purpose of the provision was to protect the vendor's margin of profit, the realization by it of a greater profit because of its failure to pay the taxes imposed by the Agricultural Adjustment Act was not contemplated by the parties when the contracts were executed. *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445 (C. C. A. 10th), certiorari denied, 314 U. S. 694; *Suncook Mills* v. *United States*, 44 F. Supp. 744 (D. Mass.). Under the contract, no advantage to either party attributable to the tax could arise since under the Agri-

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tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress subsequent to the date of this contract and made applicable directly upon production, manufacture, or sale of the supplies called for herein and are paid by the Contractor on the articles or supplies herein contracted for then the price herein stipulated will be increased or decreased accordingly and any amount due the Contractor or as result of such change will be charged to the Government and entered on vouchers as separate items.

cultural Adjustment Act and the contract the vendor was bound to pay the processing tax upon the rice furnished to the Government and the Government was bound to repay to the vendor the amount of such taxes. It was never the intention of the parties that the vendor should obtain any benefit from the taxes, and the vendor is not entitled under the contract to retain the full contract price including the unpaid processing tax.

The fact that the contract provided that the prices were to be increased by the amount of subsequently imposed taxes does not, as the court below thought (R. 41), signify any intention by the parties that the prices should not be decreased if the vendor did not pay taxes already imposed. On the contrary, the fair construction of the contract as a whole is that the vendor was to be reimbursed only for taxes which it was obligated to and did pay to the United States. Cf. *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34, 35, 36, where a similar clause[7] was construed as requiring the United States to make reimbursement for such taxes as the contractor paid pursuant to an obligation imposed upon him by a tax statute. Consequently, it is urged that the present contract should be construed as requiring the price to be adjusted

[7] This clause was like that involved in the *Glenn L. Martin* case. See fn. 6, *supra*.

according to whether or not the vendor paid the taxes envisaged in the contract.[8]

We recognize that the decisions in the *American Packing Co.* case and the *Suncook Mills* case were not based upon a contractual ground but upon the ground that the price had been fixed and paid on the basis of a mutual mistake and in equity and good conscience the Government was entitled to recover. However, both decisions recognized that the tax clauses involved had the same purpose as in the *Kansas Flour* case. We submit that those clauses and that involved here also had the same contractual effect as in the *Kansas Flour* case and that the Government's claim for recovery under the contract is valid here as in the *Kansas Flour* case. Assuming the validity of the Government's claim for the adjustment in price, there can be no question as to the authority of the Comptroller General to withhold *pro tanto* the amount of refund of income taxes due the respondent (Section 236 of the Revised Statutes, as amended by the Budget and Accounting Act of 1921, c. 18, 42 Stat. 20, 31 U. S. C. Sec. 71) or of the right to a setoff

[8] Even as to private buyers, a promise of the seller to repay the amount of the tax to the buyer if not paid to the Government has been implied where the tax is billed separately. *Wayne County Produce Co.* v. *Duffy Mott Co.*, 244 N. Y. 351. See also Restatement of the Law, Restitution, Sec. 48. As previously pointed out (p. 13), the fact that the tax is not billed separately is of no significance in a Government contract. *United States* v. *Kansas Flour Corp.*, 314 U. S. 212.

in the Court of Claims under Section 146 of the Judicial Code (28 U. S. C. Sec. 252).

B. If the Court should hold that the contract itself did not expressly or impliedly provide for a price adjustment, we submit that a setoff should be allowed[9] under the equitable principles laid down in the *American Packing Co.* case and the *Suncook Mills* case. This alternative ground was urged in the Government's brief in the *Kansas Flour* case, but the Court had no occasion to consider the point.

For reasons previously stated (pp. 9–10, 14–19, *supra*), it is clear that the contract contemplated payment of the processing tax by the vendor, and as specifically stated in the contract, the parties fixed the price accordingly. If the parties had known that the respondent was not liable for and would not pay the tax, the contract price would have been reduced *pro tanto*. Thus, the contract was executed and payment made at a price which

[9] The respondent apparently assumed in its brief in opposition (p. 11) that the Government relied entirely on the theory that it was entitled to an adjustment of price under the contract. There was no basis for such an assumption, for a direct conflict with *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445 (C. C. A. 10th), certiorari denied 314 U. S. 694, was asserted in the petition, whereas only a conflict in principle with *United States* v. *Kansas Flour Corp.*, 314 U. S. 212, was alleged; furthermore, the petition (p. 8) expressly discusses the unjust enrichment, equitable argument. The specifications of error are broad enough to cover either theory, as was the presentation below.

reflected the mutual mistake of the parties. It is true that the mistake was one of law and not of fact, but it is well settled that moneys paid out by public officials may be recovered when the payments are based on a mistake of law. *Wisconsin Central R'd* v. *United States,* 164 U. S. 190, 211-212; *Allen* v. *United States,* 204 U. S. 581; *Sutton* v. *United States,* 256 U. S. 575; *United States* v. *Wurts,* 303 U. S. 414. See also *United States* v. *Saunders,* 79 Fed. 407 (C. C. A. 1st); *Leonard* v. *Gage,* 94 F. 2d 19, 24 (C. C. A. 4th), certiorari denied, 303 U. S. 653; *United States* v. *Bentley,* 107 F. 2d 382 (C. C. A. 2d); *Talcott* v. *United States,* 23 F. 2d 897 (C. C. A. 9th), certiorari denied, 277 U. S. 604. The rule applies when the mistake is made in the execution or settlement of contracts of the United States. *Steele* v. *United States,* 113 U. S. 128; *United States* v. *Barlow,* 132 U. S. 271, 282; *Grand Trunk Wn. Ry. Co.* v. *United States,* 252 U. S. 112.

Even in the case of a private contract, recovery has been allowed to the buyer where the contract provided that the price included existing taxes and the tax was billed separately. *Wayne County Produce Co.* v. *Duffy Mott Co.,* 244 N. Y. 351. See also Restatement of the Law, Restitution, Sec. 48; and footnote 8, *supra.* But whether or not a private buyer would be entitled to recover is irrelevant here. As the Court stated in *United States* v. *Saunders,* 79 Fed. 407, 408 (C. C. A. 1st), there

is a "general right of the United States to recover moneys paid by the errors of their disbursing officers, as much where the error is one of law as of fact, provided only the moneys belong to the United States *ex aequo et bono.*" The rule is based on the distinction between public and private contracts, for the former are made by "public officers using the funds of the people" and the latter by "individuals dealing with their own money where nobody but themselves suffer for their ignorance, carelessness, or indiscretion." *Barnes* v. *District of Columbia,* 22 C. Cls. 366, 394, cited with approval in *Wisconsin Central R'd* v. *United States,* 164 U. S. 190, 212. Thus, when the United States is the buyer, public policy demands that an amount paid in the mistaken belief that the taxes attributable to the material would be paid should be recovered by the Government, for otherwise the vendor would be unjustly enriched by funds contributed by the taxpaying public.

The equitable principles applied by the courts in the *American Packing Co.* and *Suncook Mills* cases are equally applicable in this proceeding. In the *American Packing Co.* case, the Government asserted as an equitable defense to a suit on a contract that the vendor was indebted to it in the amount of unpaid processing taxes upon commodities for which the Government had paid in full under previous contracts. The Circuit Court of Appeals for the Tenth Circuit

held (122 F. 2d at p. 449) that under the Federal Rules of Civil Procedure (Rule 8 (e) (2)) and the law of Utah, where the suit was brought, the Government had the right to assert such an equitable set-off as a defense. It also held that to sustain an action for money had and received, it was sufficient to show that one party had obtained money "under such circumstances that in equity and good conscience it should be returned" to the other party (*ibid.*). In the *Suncook Mills* case, the court pointed out that the same rule prevailed under the law of Massachusetts applicable in that case. The present suit is one brought for the recovery of income taxes, and the taxpayer (respondent here) is not entitled to recover unless the Government holds money which *ex aequo et bono* belongs to the taxpayer. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 402–403; *Lewis* v. *Reynolds*, 48 F. 2d 515 (C. C. A. 10th), affirmed, 284 U. S. 281; see also *Bull* v. *United States*, 295 U. S. 247.

The respondent asserted that there has been no unjust enrichment or else that the unjust enrichment is limited to $341.34 because of the unjust enrichment tax imposed under Title III of the Revenue Act of 1936, c. 690, 49 Stat. 1648. In the *Kansas Flour* case, this Court pointed out that if the respondent were required to reduce its price by the amount of the unpaid processing tax, it would not be liable for the unjust enrichment tax. See Section 501 (b) (2) and (j) (4) of the Reve-

nue Act of 1936 (26 U. S. C. Sec. 700 (b) (2) and (j) (4)). We make the same concession here. In this case, however, the unjust enrichment tax has been paid. The amount by which it was increased as the result of the inclusion of the transactions here involved was $1,706.59 as contrasted with the unpaid processing taxes of $8,479.60. (See Statement, *supra*, pp. 5–6.) The difference is the amount which the Government is equitably entitled to retain.[10]

CONCLUSION

The decision of the court below should be reversed and recovery limited to $1,706.59.

Respectfully submitted.

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Solicitor General.
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Assistant Attorney General.
SEWALL KEY,
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WALTER J. CUMMINGS, JR.,
Attorney.

OCTOBER 1944.

[10] The respondent's contention in its brief in opposition (p. 14) that it was unjustly enriched only to the extent of 20% of $1,706.59 or $341.34 rather than to the extent of $8,479.60 less $1,706.59, is mistaken.

U. S. GOVERNMENT PRINTING OFFICE, 1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. [redacted] 72

THE UNITED STATES, *Petitioner*,

v.

STANDARD RICE COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

JOHN C. WHITE,
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IN THE

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OCTOBER TERM, 1943.

No. 944.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Claims (R. 37-41) is reported in 53 F. Supp. 717.

JURISDICTION.

The judgment of the Court of Claims was entered February 7, 1944. The petition for a writ of certiorari was filed on April 28, 1944. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED.

The question involved is whether respondent should be denied the right to recover amounts withheld by the Comptroller General from admitted overpayments of income taxes because of an alleged indebtedness for processing taxes on rice furnished the United States under a contract which provided:

> "Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item."

The respondent did not pay the processing taxes on the rice supplied because their collection was permanently enjoined following the Supreme Court decision that the Agricultural Adjustment Act was unconstitutional.

STATUTES INVOLVED.

Budget and Accounting Act, 1921, c. 18, 42 Stat. 20:

> SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:
>
> "SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." (31 U. S. C., Sec. 71.)

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended:

> SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agricul-

ture determines that any one or more payments authorized to be made under section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; * * *. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized under section 8 which are in effect are to be discontinued with respect to such commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture * * * (7 U. S. C., Sec. 609).

MISCELLANEOUS

SEC. 10. * * *

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

* * * * * * * * * * *

(7 U. S. C., Sec. 610)

COMMODITIES

SEC. 11. As used in this title, the term "basic agricultural commodity" means wheat, rye, flax, barley, cotton, field corn, grain sorghums, hogs, cattle, rice, potatoes, tobacco, peanuts, sugar beets and sugarcane, and milk and its products, and any regional or market classification, type, or grade thereof; * * * (7 U. S. C., Sec. 611).

Revenue Act, 1936, c. 690, 49 Stat. 1734:

SEC. 501. Tax on Net Income from Certain Sources.

(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:

(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid, which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed. * * *

(c) The net income from the sales specified in subsection (a)(1) shall be computed as follows:

(1) From the gross income from such sales there shall be deducted the allocable portion of the deductions from gross income for the taxable year which are allowable under the applicable Revenue Act; or

(2) If the taxpayer so elects by filing his return on such basis, the total net income for the taxable year from the sale of all articles with respect to which each Federal excise tax was imposed (computed by deducting from the gross income from such sales the allocable portion of the deductions from gross income which are allowable under the applicable Revenue Act, but without deduction of the amount of such Federal excise tax which was paid or of the amount of reimbursement to purchasers with respect to such Federal excise tax) shall be divided by the total quantity of such articles sold during the taxable year and the quotient shall be multiplied by the quantity of such articles involved in the sales specified in subsection (a)(1). Such quantities shall be expressed in terms of the unit on the basis of which the Federal excise tax was imposed.

For the purposes of this section the proper apportionment and allocation of deductions with respect to gross

income shall be determined under rules and regulations prescribed by the Commissioner with the approval of the Secretary. * * *

(e) For the purposes of subsection (a)(1), (2), and (3) the extent to which the taxpayer shifted to others the burden of a Federal excise tax shall be presumed to be an amount computed as follows:

(1) From the selling price of the articles there shall be deducted the sum of (A) the cost of such articles plus (B) the average margin with respect to the quantity involved; or

(2) If the taxpayer so elects by filing his return on such basis, from the aggregate selling price of all articles with respect to which such Federal excise tax was imposed and which were sold by him during the taxable year (computed without deduction of reimbursement to purchasers with respect to such Federal excise tax) there shall be deducted the aggregate cost of such articles, and the difference shall be reduced to a margin per unit in terms of the basis on which the Federal excise tax was imposed. The excess of such margin per unit over the average margin (computed for the same unit) shall be multiplied by the number of such units represented by the articles with respect to which the computation is being made; but

(3) In no case shall the extent to which the taxpayer shifted to others the burden of the Federal excise tax with respect to the articles be deemed to exceed the amount of such tax with respect to such articles minus (A) the portion of the amount of the Federal excise tax (or of the reimbursement specified in subsection (a)(2)) with respect to the articles which is paid or credited by the taxpayer to any purchasers as specified in subsection (f) (3) and minus (B) the amount of any increase in the tax under section 602 of the Revenue Act of 1932 for which the taxpayer under this section became liable as the result of the nonpayment or refund of the Federal excise tax with respect to the articles.

(f) As used in this section—

(1) The term "margin" means the difference between the selling price of articles and the cost thereof, and the term "average margin" means the average difference between the selling price and the cost of similar articles sold by the taxpayer during his six taxable years preceding the initial imposition of the Federal excise tax in question except that if during any part of such six-year period the taxpayer was not in business, or if his records for any part of such period are so inadequate as not to furnish satisfactory data, the average margin of the taxpayer for such part of such period shall, when necessary for a fair comparison, be deemed to be the average margin, as determined by the Commissioner, of representative concerns engaged in a similar business and similarly circumstanced.

(2) The term "cost" means, in the case of articles manufactured or produced by the taxpayer, the cost to the taxpayer of materials entering into the articles; or, in the case of articles purchased by the taxpayer for resale, the price paid by him for such articles (reduced in both cases by the amount for which he is reimbursed by his vendor).

(3) The term "selling price" means selling price minus (A) amounts subsequently paid or credited to the purchaser on or before June 1, 1936, or thereafter in the bona fide settlement of a written agreement entered into on or before March 3, 1936, as reimbursement for the amount included in such price on account of a Federal excise tax; and minus (B) the allocable portion of any professional fees and expenses of litigation incurred in securing the refund or preventing the collection of the Federal excise tax, not to exceed 10 per centum of the amount of such tax.

(g) In determining costs, selling prices, and net income, the taxpayer shall, unless otherwise shown, be deemed to have sold articles in the order in which they were manufactured, produced, or acquired. Where the taxpayer's records do not adequately establish the quantity of a commodity taxable under the Agricul-

tural Adjustment Act, as amended, entering into articles sold by him, such quantities shall be computed by the use of the conversion factors prescribed in regulations under such Act, as amended. * * *

"(i) Either the taxpayer or the Commissioner may rebut the presumption established by subsection (e) by proof of the actual extent to which the taxpayer shifted to others the burden of the Federal excise tax. Such proof may include, but shall not be limited to:

(1) Proof that the change or lack of change in the margin was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or materials, or (B) in costs of production. If the taxpayer asserts that the burden of the tax was borne by him while the burden of any other increased cost was shifted to others, the Commissioner shall determine, from the respective effective dates of the tax and of the other increase in cost as compared with the date of the change in margin, and from the general experience of the industry, whether the tax or the increase in other cost was shifted to others. If the Commissioner determines that the change in margin was due in part to the tax and in part to the increase in other cost, he shall apportion the change in margin between them.

(2) Proof that the taxpayer modified contracts of sale, or adopted a new contract of sale, to reflect the initiation, termination, or change in amount of the Federal excise tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the taxpayer may establish that such acts were caused by factors other than the tax, or that they do not represent his practice during the period in which the articles in question were sold.

(j) As used in this section—

(1) The term "Federal excise tax" means a tax or exaction with respect to the sale, lease, manufacture, production, processing, ginning, importation, transportation, refining, recovery, or holding for sale or other disposition, of commodities or articles, provided for by any Federal statute, whether valid or invalid, if denominated a "tax" by such statute. A Federal excise tax shall be deemed to have been imposed with respect to an article if it was imposed with respect to (or with respect to the processing of) any commodity or other article, from which such article was processed.

(2) The term "date of the termination of the Federal excise tax" means, in the case of a Federal excise tax held invalid by a decision of the Supreme Court, the date of such decision.

(3) The term "refund or credit" does not include a refund or credit made in accordance with the provisions and limitations set forth in Title VII of this Act, or in section 621 (d) of the Revenue Act of 1932.

(4) The term "tax adjustment" means a repayment or credit by the taxpayer to his vendee of an amount equal to the Federal excise tax with respect to an article (less reasonable expense to the vendor in connection with the nonpayment or recovery by him of the amount of such tax and in connection with the making of such repayment or credit) if such repayment or credit is made on or before June 1, 1936, or thereafter in the bona fide settlement of a written agreement entered into on or before March 3, 1936.

(5) The term "taxpayer" means a person subject to a tax imposed by this section. * * *.

(l) The taxes imposed by subsection (a) shall be imposed on the net income from the sources specified therein, regardless of any loss arising from the other transactions of the taxpayer, and regardless of whether the taxpayer had a taxable net income (under the income-tax provisions of the applicable Revenue Act) for the taxable year as a whole; except that if such application of the tax imposed by subsection (a) is held

invalid, the tax under subsection (a) shall apply to that portion of the taxpayer's entire net income for the taxable year which is attributable to the net income from the sources specified in such subsection.

STATEMENT.

Respondent, a corporation engaged in the business of milling rice for sale, as a first domestic processor of rice, paid the processing taxes imposed by the Agricultural Adjustment Act of May 12, 1933, as amended, from April 1, 1935 to September 20, 1935. Before paying the processing tax on the rice processed for the month of October, 1935, respondent applied to and obtained from the United States District Court for the Western District of Texas (No. 577 in Equity) an injunction against the Collector of Internal Revenue, prohibiting the collection from it of any further processing taxes, and no processing taxes were paid by the respondent after the month of September, 1935 (R. 33, 35).

On November 13, 1935, respondent entered into a contract with petitioner under which respondent agreed to supply rice to the Navy Department at bid prices specified in the contract, under which respondent delivered the total quantity of 584,000 pounds of milled rice in December, 1935, January, February and March, 1936, and received full payment therefor. A typical price provision of said contract read as follows:

Item	Pounds (about)	Unit Price (per pound)	Total
1. Rice	290,000	.046	$13,340.00

(R. 35)

The contract contained the following provision:

"Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may here-

after (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item." (R. 35)

The Comptroller General, on behalf of the United States asserted claim in the amount of $8,479.60 against respondent for unpaid processing taxes on said contract. (R. 35, 36)

The Comptroller General withheld the sum of $2,334.23 against an overassessment of income taxes, duly authorized by the Commissioner of Internal Revenue, for the respondent's fiscal year ended July 31, 1935, and the sum of $6,145.37 against an overassessment of income taxes for the claimant's fiscal year ended July 31, 1938. The Comptroller General credited said sums against the alleged indebtedness for processing taxes under the contract here involved. (R. 33, 34, 36)

Claims for refund of said sums were duly filed with the Commissioner of Internal Revenue and have never been denied. (R. 34)

Respondent paid its unjust enrichment taxes upon the basis of the inclusion of the units involved in the claim of the Comptroller General. Exclusion of such units would reduce said unjust enrichment taxes in the amount of $1,706.59. (R. 37)

No portion of the overpayments of income tax for the fiscal years ended July 31, 1935 and July 31, 1938, which were withheld by the Comptroller General as credits against alleged indebtedness for processing taxes have ever been refunded or repaid otherwise. (R. 37)

This suit was duly brought in the Court of Claims, and that Court, on February 7, 1944, entered judgment in favor of respondent for $8,479.60 with interest. (R. 41)

ARGUMENT

The petitioner very definitely ties its request for the issuance of a writ of certiorari to the specific tax provision of the contract. This is apparent in the specification of errors of the petition (p. 7). The first specification refers to the alleged right to recovery of amounts paid "under the contract" and the second to the petitioner's overruled interpretation of the "contract provision". In other words, the petitioner founds its case on its rights under the contract and must stand or fall on the particular provision which was construed in the respondent's favor by the Court below.

The position of the petitioner in this regard is made yet more positive by the third and general specification of error in which it is said the Court below erred "in failing to enter judgment for the United States and dismissing the petition." Thus, the Government seeks dismissal of respondent's petition below without qualification. This would be possible only if the Government's theory of the contract could be sustained for the Government conceded that under no theory of unjust enrichment did it have any equity in the sum of $1,706.59 of the amount involved in the petition below (Petition p. 6, footnote and R. 37, 38). The arguments of the pefition must therefore be considered in the light of its basic premise.

The petitioner claims that the decision below is in conflict with "the principle" of the case of *United States v. Kansas Flour Mills Corporation*, 314 U. S. 212, where the contract in question provided:

> "Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, *processing tax*, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or

supplies herein contracted for, then the prices named in this contract will be increased *or decreased* accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

It is true that the Supreme Court discussed the theory of unjust enrichment but it deliberately avoided any ruling on the point. The decision in the *Kansas Flour Mills* case was directed specifically to the contention of the respondent therein that its retention of the full price was inevitable under the contract. The Supreme Court carefully spelled out its reasoning that this was not true since the so-called "up and down" clause covered a "change" in "processing taxes" recognized and confirmed by Congress within the meaning of the contract. 314 U. S. 217, 218. The Government thus was within its rights in its actions under the contract in the *Kansas Flour Mills* case.

Here the "change" provision of that case is absent. There is also no express mention of processing taxes in the tax clause and the Court below emphasized that nothing in the contract or any proved circumstance of the contract showed that the parties had it in mind. Furthermore, the express provision that new federal taxes should be billed to the Government gives strong support to the petition of respondent that the reverse should not be implied in the silence of the parties. The result of the retention of the full price is consequently inevitable under this contractual provision as the Court below held. The Government contract is not to be removed from the general law of contracts and its construction must be on that basis.

The decision in the *Kansas Flour Mills* case is not, therefore, in conflict with the decision of the Court below. Both decisions are based upon specific tax clauses, vastly different in their implications, and the fact that the Supreme Court adhered to a contractual theory in its reasoning supports the conclusion of the Court below.

As another reason for granting the writ the petitioner maintains that the decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in *United States* v. *American Packing & Provision Co.*, 122 F. (2d) 445, certiorari denied, 314 U. S. 694. In that case many types of contracts were involved and the Court conceded that "if the right of the Government to recover is dependent upon the contracts between the parties, it must fail". Moreover, the opinion relates (at p. 449): "Indeed, the Government did not plead the contracts between the parties as a basis for its right to recovery * * *". The rights of the Government were determined upon equitable principles under the law of the State of Utah.

That is quite a different situation from this case in which the petitioner pleads error in the Court below on the basis of its interpretation of the contract provision involved and its failure to dismiss the respondent's petition without reference to the portion of the petitioner's claim in which the Government conceded it had no equity whatsoever. On the respective procedures and facts involved, there is no basis for an asserted conflict between the two decisions.

How little equity there is to support the Government's assertion is shown by the following facts:

(1) The tax clause itself, drafted by the Government, provides for no adjustment downward.

(2) The contract was entered into on November 13, 1935, at a time when courts everywhere were granting injunctions restraining collection of the processing tax following the decision of the Circuit Court of Appeals in *Butler* v. *United States*, 78 Fed. (2d) 1. The plaintiff did not pay the processing tax for October but obtained an injunction restraining its collection. This demonstrates the lack of any such understanding by the parties as that found by the Court in the *Kansas Flour Mills* case, where the contract expressly covered processing taxes.

(3) Contrary to the situation in either of the cases cited by petitioner the United States has irrevocably collected from respondent here an unjust enrichment tax in the sum of $1,706.59 on the very contracts involved. This tax imposed by Section 501 of the Revenue Act of 1936 was 80 per cent of the amount of unjust enrichment, so that the respondent was on that determination by the petitioner, under the elaborate standards expressly laid down by Congress, left with $341.34 of "unjust enrichment" funds compared to the $8,479.60 petitioner is seeking to retain here. Can such a claim be founded in justice and good conscience?

Such a determination of the amount of unjust enrichment by petitioner more than counterbalances any equity it can found solely upon the tax provision here involved.

Petitioner's effort to tie the *American Packing & Provision Company* case into the *Kansas Flour Mills* decision is necessarily and obviously speculative. That decision was plainly in line generally with the ultimate result of the *Kansas Flour Mills* case, and the denial of certiorari does not show that this court approved the same result in all contract cases regardless of the facts. At any rate, the denial of certiorari in the *American Packing & Provision Company* case can hardly be interpreted as authority for declaring the decision of the Court below to be in conflict with the decision of the Tenth Circuit Court, or with the decision of the Supreme Court in the *Kansas Flour Mills* case.

Finally, the petitioner submits the question involved is of considerable importance because there are "several hundred contracts" of a like nature. It is suggested that the number of contracts alone is no criterion of importance apart from the number of contractors concerned and the amounts involved. These the petitioner does not reveal; they may be few and the amounts small. It is hardly believed that this question is now of such general importance as to require the consideration of this Honorable Court.

CONCLUSION.

It is therefore respectfully submitted that the decision below is correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1944.

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OPINION BELOW.

The opinion of the Court of Claims (R. 37-41) is reported in 53 F. Supp. 717.

JURISDICTION.

The judgment of the Court of Claims was entered February 7, 1944 (R. 41). The petition for a writ of certiorari was filed on April 28, 1944, and was granted on June 12,

1944 (R. 42). The jurisdiction of this Court rests on Section 3(2) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED.

The question involved is whether respondent should be denied the right to recover amounts withheld by the Comptroller General from admitted overpayments of income taxes because of an alleged indebtedness for processing taxes on rice furnished the United States under a contract which provided:

> "Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item."

The respondent did not pay the processing taxes on the rice supplied because their collection was permanently enjoined following the Supreme Court decision that the Agricultural Adjustment Act was unconstitutional. Respondent did pay $1,706.59 in unjust enrichment taxes upon the units supplied to the United States in this transaction.

STATUTES INVOLVED.

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> SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:
>
> "SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." (31 U. S. C., Sec. 71.)

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MISCELLANEOUS

SEC. 10. * * * *

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

* * * * * * * * * * *

(7 U. S. C., Sec. 610)

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SEC. 11. As used in this title, the term "basic agricultural commodity" means wheat, rye, flax, barley, cotton, field corn, grain sorghums, hogs, cattle, rice, potatoes, tobacco, peanuts, sugar beets and sugarcane, and milk and its products, and any regional or market classification, type, or grade thereof; * * * (7 U. S. C., Sec. 611).

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SEC. 501. Tax on Net Income from Certain Sources.

(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:

(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed. * * *

(c) The net income from the sales specified in subsection (a)(1) shall be computed as follows:

(1) From the gross income from such sales there shall be deducted the allocable portion of the deductions from gross income for the taxable year which are allowable under the applicable Revenue Act; or

(2) If the taxpayer so elects by filing his return on such basis, the total net income for the taxable year from the sale of all articles with respect to which each Federal excise tax was imposed (computed by deducting from the gross income from such sales the allocable portion of the deductions from gross income which are allowable under the applicable Revenue Act, but without deduction of the amount of such Federal excise tax which was paid or of the amount of reimbursement to purchasers

with respect to such Federal excise tax) shall be divided by the total quantity of such articles sold during the taxable year and the quotient shall be multiplied by the quantity of such articles involved in the sales specified in subsection (a)(1). Such quantities shall be expressed in terms of the unit on the basis of which the Federal excise tax was imposed.

For the purposes of this section the proper apportionment and allocation of deductions with respect to gross income shall be determined under rules and regulations prescribed by the Commissioner with the approval of the Secretary. * * *

(c) For the purposes of subsection (a)(1), (2), and (3) the extent to which the taxpayer shifted to others the burden of a Federal excise tax shall be presumed to be an amount computed as follows:

(1) From the selling price of the articles there shall be deducted the sum of (A) the cost of such articles plus (B) the average margin with respect to the quantity involved; or

(2) If the taxpayer so elects by filing his return on such basis, from the aggregate selling price of all articles with respect to which such Federal excise tax was imposed and which were sold by him during the taxable year (computed without deduction of reimbursement to purchasers with respect to such Federal excise tax) there shall be deducted the aggregate cost of such articles, and the difference shall be reduced to a margin per unit in terms of the basis on which the Federal excise tax was imposed. The excess of such margin per unit over the average margin (computed for the same unit) shall be multiplied by the number of such units represented by the articles with respect to which the computation is being made; but

(3) In no case shall the extent to which the taxpayer shifted to others the burden of the Federal excise tax with respect to the articles be deemed to exceed the amount of such tax with respect to such articles minus (A) the portion of the amount of the Federal excise tax (or of the reimbursement speci-

fied in subsection (a) (2) with respect to the articles which is paid or credited by the taxpayer to any purchasers as specified in subsection (f) (3) and minus (B) the amount of any increase in the tax under section 602 of the Revenue Act of 1932 for which the taxpayer under this section became liable as the result of the nonpayment or refund of the Federal excise tax with respect to the articles.

(f) As used in this section—

(1) The term "margin" means the difference between the selling price of articles and the cost thereof, and the term "average margin" means the average difference between the selling price and the cost of similar articles sold by the taxpayer during his six taxable years preceding the initial imposition of the Federal excise tax in question, except that if during any part of such six-year period the taxpayer was not in business, or if his records for any part of such period are so inadequate as not to furnish satisfactory data, the average margin of the taxpayer for such part of such period shall, when necessary for a fair comparison, be deemed to be the average margin, as determined by the Commissioner, of representative concerns engaged in a similar business and similarly circumstanced.

(2) The term "cost" means, in the case of articles manufactured or produced by the taxpayer, the cost to the taxpayer of materials entering into the articles; or, in the case of articles purchased by the taxpayer for resale, the price paid by him for such articles (reduced in both cases by the amount for which he is reimbursed by his vendor).

(3) The term "selling price" means selling price minus (A) amounts subsequently paid or credited to the purchaser on or before June 1, 1936, or thereafter in the bona fide settlement of a written agreement entered into on or before March 3, 1936, as reimbursement for the amount included in such price on account of a Federal excise tax; and minus (B) the allocable portion of any professional fees and expenses of litigation incurred in securing the refund or preventing the collection of the Federal ex-

cise tax, not to exceed 10 per centum of the amount of such tax.

(g) In determining costs, selling prices, and net income, the taxpayer shall, unless otherwise shown, be deemed to have sold articles in the order in which they were manufactured, produced, or acquired. Where the taxpayer's records do not adequately establish the quantity of a commodity taxable under the Agricultural Adjustment Act, as amended, entering into articles sold by him, such quantities shall be computed by the use of the conversion factors prescribed in regulations under such Act, as amended. • • •

(i) Either the taxpayer or the Commissioner may rebut the presumption established by subsection (e) by proof of the actual extent to which the taxpayer shifted to others the burden of the Federal excise tax. Such proof may include, but shall not be limited to:

(1) Proof that the change or lack of change in the margin was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or materials, or (B) in costs of production. If the taxpayer asserts that the burden of the tax was borne by him while the burden of any other increased cost was shifted to others, the Commissioner shall determine, from the respective effective dates of the tax and of the other increase in cost as compared with the date of the change in margin, and from the general experience of the industry, whether the tax or the increase in other cost was shifted to others. If the Commissioner determines that the change in margin was due in part to the tax and in part to the increase in other cost, he shall apportion the change in margin between them.

(2) Proof that the taxpayer modified contracts of sale, or adopted a new contract of sale, to reflect the initiation, termination, or change in amount of the Federal excise tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed

the tax as a separate item to any vendee or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the taxpayer may establish that such acts were caused by factors other than the tax, or that they do not represent his practice during the period in which the articles in question were sold.

(j) As used in this section—

(1) The term "Federal excise tax" means a tax or exaction with respect to the sale, lease, manufacture, production, processing, ginning, importation, transportation, refining, recovery, or holding for sale or other disposition, of commodities or articles, provided for by any Federal statute, whether valid or invalid, if denominated a "tax" by such statute. A Federal excise tax shall be deemed to have been imposed with respect to an article if it was imposed with respect to (or with respect to the processing of) any commodity or other article, from which such article was processed.

(2) The term "date of the termination of the Federal excise tax" means, in the case of a Federal excise tax held invalid by a decision of the Supreme Court, the date of such decision.

(3) The term "refund or credit" does not include a refund or credit made in accordance with the provisions and limitations set forth in Title VII of this Act, or in section 621 (d) of the Revenue Act of 1933.

(4) The term "tax adjustment" means a repayment or credit by the taxpayer to his vendee of an amount equal to the Federal excise tax with respect to an article (less reasonable expense to the vendor in connection with the nonpayment or recovery by him of the amount of such tax and in connection with the making of such repayment or credit) if such repayment or credit is made on or before June 1, 1936, or thereafter in the bona fide settlement of a written agreement entered into on or before March 3, 1936.

(5) The term "taxpayer" means a person subject to a tax imposed by this section. * * *

(l) The taxes imposed by subsection (a) shall be imposed on the net income from the sources specified therein, regardless of any loss arising from the other transactions of the taxpayer, and regardless of whether the taxpayer had a taxable net income (under the income-tax provisions of the applicable Revenue Act) for the taxable year as a whole; except that if such application of the tax imposed by subsection (a) is held invalid, the tax under subsection (a) shall apply to that portion of the taxpayer's entire net income for the taxable year which is attributable to the net income from the sources specified in such subsection.

ARGUMENT.

The Petitioner Is Not Entitled to Withhold the Sum It Claims Herein.

A. The provision of the contract in question here which was drafted by the Government is substantially different from the provision, also drawn by Government attorneys, involved in the case of *United States* v. *Kansas Flour Mills Corporation*, 314 U. S. 212. The latter clause read as follows (314 U. S. at p. 213):

"Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

That clause, therefore, contained specific, explicit direction for adjustment of the price downward under the circumstances indicated. The contention of the vendor in the *Kansas Flour Mills* case was that relief from payment of processing taxes through the declaration of invalidity of the taxing statute by the Supreme Court in *United States* v. *Butler*, 297 U. S. 1, was not a "change" within the meaning of the contract, and no adjustment was consequent thereon.

However, the Supreme Court with care and nicety spelled out of the enactment of the Revenue Act of 1936, 49 Stat. 1648, a recognition and confirmation of a change in the vendor's tax liability by Congress within the meaning of the contract provision.

That determination of the Supreme Court was expressly founded on the law of contracts. The parties were held to the provision they had agreed upon. Strict construction of the contract was the essence of the decision in the *Kansas Flour Mills* case.

The Government here advances a highly conjectural argument that the contractual provision in issue is exactly equivalent under the law of contracts to that considered in the earlier decision. This argument makes a mockery of the painstaking analysis of the operation and effect of the "change" provision in the *Kansas Flour Mills* opinion. The declaration of the immateriality of the absence here of an "up and down" provision runs counter to the fact that the decision of the Supreme Court went directly on that provision.

No authority has been cited to support this strained interpretation of the contract. The decisions in *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62, and *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34, frequently cited in brief by the Government, stand for nothing more than that the vendors therein could not bill the Government for taxes imposed after the contracts were entered into under the respective tax clauses. In the first, the new taxes

could not be appropriately said to meet the test of "applicability." and in the second, the new taxes were paid not by the vendor but by his subcontractors. Moreover, the brief for the Government (p. 20) recognizes that the decisions in *United States* v. *American Packing & Provision Co.*, 122 F. (2d) 445 (C. C. A. 10th), cert. den. 314 U. S. 694, and *Suncook Mills* v. *United States*, 44 F. Suppl. 744 (D. Mass.), do not support the contract theory advanced by the Government in the instant case.

This attempt to create a downward price adjustment by impliction runs afoul of strict contractual interpretation. The fact that a Government contract is involved should not produce any deviation from the principles of the law of contracts. "A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument". *Hollerbach* v. *United States*, 233 U. S. 165, 171, 172. Or in the words of Mr. Justice Brandeis: "When the United States enters into contract relations, its right and duties therein are governed generally by the law applicable to contracts between private individuals". *Lynch* v. *United States*, 292 U. S. 571, 579.

Explicit language has always been held by the Supreme Court as a necessary predicate to liability. *United States* v. *Blair*, U. S. , No. 75, October Term 1943, decided April 10, 1944; *United States* v. *Rice*, 317 U. S. 61; *H. E. Crook Co.* v. *United States*, 270 U. S. 6. Certainly, the absence of explicit provision for a downward price adjustment in this case signifies no undertaking by the vendor that one would be provided.

Moreover, the contention of the Government asks in effect the revision of the contract to accord with its view. This, it is submitted, can not be done. In well chosen words, this Court has said: "* * * we are not justified in rewriting the clear provisions of the contract to include what might well have been but was not inserted. * * * ". *United States* v. *American Surety Co.*, U. S. ,

No. 381, October Term 1943, decided April 24, 1944.

Finally, with respect to the meaning of the contract provision, there is no better expression than the apt and significant words of Judge Madden, speaking for the Court below (R. 40):

> "We think that the language of the contract in the instant case does not express or imply an intention that the Government is to get, either as taxes or by offset or otherwise, the amount of any applicable federal tax which was in existence when the contract was made. We think the tax provision of the contract, which was drawn by the Government and whose ambiguities should therefore be resolved against the Government, may very well have been meant only to foreclose any argument as to whether federal taxes were payable upon federal purchases and the steps preparatory thereto."

There can be no question that this is a sound interpretation of a contract which did not expressly or impliedly provide for a price adjustment as suggested by Petitioner.

B. The Petitioner in its second position contends that elements of unjust enrichment are such in this case that the United States is equitably entitled to retain funds otherwise admittedly due respondent to cover amounts of unpaid processing taxes. This theory rests on three assumptions: first, that there was a mutual mistake of the parties with respect to the collectibility of the processing taxes; second, that the United States as vendee was powerless to adjust the tax discrepancy; and third, that the final result found the vendor unjustly enriched at the expense of the taxpaying public.

With respect to any theory of mutual mistake, it is pointed out that the tax clause itself, drafted by the Government, did not mention processing taxes specifically and provided for no price adjustment downward. There was a recognized doubt as to the validity of the processing taxes

when the contract was entered into on November 13, 1935. By that time courts everywhere were granting injunctions restraining collection of the processing tax following the decision of the Circuit Court of Appeals in *Butler* v. *United States*, 78 F. 2d 1 (CCA 1). That this legal situation weighed heavily in the bid price and that it would not have, as petitioner argues in brief at page 21, have been reduced pro tanto, is shown by the fact that only $1,706.59 unjust enrichment tax was determined by the government as a result of the inclusion of this contract.

The vendee in a private contract may have the chance to pass the tax burden on to his customers. The United States through its power to tax can legislatively pass that burden right back to the vender, not to the taxpaying public. This is exactly what Congress immediately did in the passage of the Revenue Act of 1936 so that it cannot be said the United States was without a remedy. The unjust enrichment tax imposed by Section 501 of that Act laid down expressly elaborate standards for determining just what a vendor should pay to the United States for having shifted to another the burden of processing taxes he did not pay.

Contrary to the facts in the case of *United States* v. *American Packing & Provision*, 122 F. 2d 445, cert. den. 314 U. S. 694, and apparently in the case of *Suncook Mills* v. *United States*, 44 F. Supp. 744, and for that matter in the *Kansas Flour Mills* case itself, the United States has irrevocably collected from respondent vendor here an unjust enrichment tax on the very contracts involved. Petitioner not only had available, but has availed itself of, another entirely adequate remedy.

Moreover, it must be remembered that the total price under the contract here was only $27,185.25 (R. 12). If 80% of the "unjust enrichment" funds determined as specified by Congress is $1,706.59, it is obvious that the total of such "unjust enrichment" was less than 8% of the total price, and, after the unjust enrichment tax was

paid, only $426.65* of that fund was left to the vendor respondent here, and that by Congressional direction and consent.

If this $426.65 which Congress left respondent is compared with the $6,773.01, i.e. $8,479.60 less $1,706.59, belonging to respondent, which petitioner is seeking to retain here, the government's position can scarcely appeal to the conscience of the court. It is asking more than 30 per cent reduction in a contract price which it has already determined involved an unjust enrichment of less than 8 per cent prior to its collection of the $1,706.59.

Any conclusion that respondent was unjustly enriched in excess of the sum of $426.65 must be based upon pure assumptions of fact without any support in the record. The assumptions, moreover, must disregard the very criteria Congress has prescribed and which as the record does show leaves respondent with $426.65 of unjust enrichment at most. Petitioner asks this Court to substitute judicial assumption for the Congressional criteria in determining the equities here, and seeks to wash its own hands by admitting respondent's right to recover the $1,706.59 it previously sought and received under the remedy already utilized by it. Petitioner has established no claim for equitable relief.

CONCLUSION.

The decision of the Court below is correct and should be affirmed.

Respectfully submitted,

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November 1944.

* The figure, $341.40, used in the brief in opposition (R. 14) is an error in mathematical computation; $426.65 is undeniably correct.

SUPREME COURT OF THE UNITED STATES.

No. 72.—October Term, 1944.

The United States, Petitioner, vs. Standard Rice Company, Inc. } On Writ of Certiorari to the Court of Claims.

[December 4, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

This suit was brought in the Court of Claims to recover an overpayment of income taxes made by respondent. The United States conceded that the amount claimed was owed. But the Comptroller General, pursuant to his power under § [illegible] of the Budget and Accounting Act of 1921 (42 Stat. 29, 31 U. S. C. § 71) settled and adjusted the claim by offsetting against it an amount which he concluded respondent owed the United States under a contract. Since the latter claim equalled the overassessment on the income taxes, the Comptroller General refused to authorize a refund to respondent. This suit followed. The Court of Claims denied the offset and entered judgment for respondent in the amount claimed with interest. 53 F. Supp. 717. The case is here on a petition for a writ of certiorari[1] which we granted because of an asserted conflict of the decision below with *United States* v. *American Packing & Provision Co.*, 122 F. 2d 445 and *United States* v. *Kansas Flour Corp.*, 314 U. S. 212.

The contract under which the claim against respondent was asserted was made in November, 1935. Respondent agreed to supply rice to the Navy Department at the bid prices specified in the contract. A typical price provision listed 290,000 pounds of rice at a unit price (per pound) of .046¢ or a total price of $13,340. The contract contained the following provision:

> "Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item."

[1] See Act of February 13, 1925, § 3(b), 43 Stat. 939, amended by the Act of May 22, 1939, 53 Stat. 752, 28 U. S. C. § 288(b).

Respondent made the required deliveries to the United States and received the full price specified in the contract. Respondent was the first domestic processor of the rice and accordingly paid the processing taxes imposed by the Agricultural Adjustment Act (48 Stat. 31, 7 U. S. C. §§ 609, 611) from April 1, 1935, until September 20, 1935. Before paying the processing tax on the rice processed for the month of October, 1935, respondent obtained an injunction against its collection. The tax was held invalid in *United States* v. *Butler*, 297 U. S. 1, decided January 6, 1936. Consequently respondent never paid the processing taxes on the rice supplied to the United States under the November, 1935, contract.[2]

The tax was a federal tax "applicable" to the rice within the meaning of the contract. *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62, 65. Its amount was known, and the vendor was responsible by regulation for its payment. *United States* v. *Kansas Flour Mills Corp.*, *supra*, p. 214. It is therefore arguable that the vendor fixed the bid price to provide a margin of profit after payment of those taxes for which it was responsible, that the price was designed to offset *pro tanto* the amount of the taxes, and that if they were not paid, the price should be reduced. That is the position taken by the United States and it relies on the following statement in *United States* v. *Kansas Flour Mills Corp.*, *supra*, pp. 216-217: "In the contracts in question, the Government did not buy for resale. Unless it received the tax it suffered a definite disadvantage. Its purpose, as shown by the contracts, was to balance the tax element in the price paid with the tax collected. The Government, which could not pass on the tax on resale, was thus protected not against a fall in the market price but against a loss in its tax revenues." But we were there only answering the argument that since the vendor did not undertake to pay the tax, the rule in private contracts should be followed and no readjustment of the price made where the tax was not paid. The difference between the cases was that in the latter situation the vendee pre-

[2] Respondent did, however, pay an unjust enrichment tax of $72,072.30 on account of being relieved of the processing tax. See Title III of the Revenue Act of 1936, 49 Stat. 1648, 1734. It was computed and assessed upon the basis of inclusion of units involved in this suit. If those units had been excluded, the unjust enrichment tax would have been reduced by $1,706.59. If respondent is required to reduce its price by the amount of the unpaid processing tax, it is not subject to the unjust enrichment tax on these transactions. See United States v. Kansas Flour Mills Corp., *supra*, p. 216, note 6. The United States concedes that if it prevails the respondent is entitled to recover $1,706.59.

suitably passed on the tax while the United States did not since it did not buy for resale. The vital fact in *United States* v. *Kansas Flour Mills Corp.* was the provision in the contract for an up-or-down revision of the price in case of a change in the processing tax by Congress. It provided that if a processing tax was thereafter "imposed or changed by the Congress", the contract price was to be "increased or decreased accordingly." It was held that the decision in *United States* v. *Butler* and its recognition in the Revenue Act of 1936 amounted to a downward change calling for a decrease in the contract price. 314 U. S. p. 217. There is no such provision in the present contract. The clause that the bid prices includes "any Federal tax heretofore imposed by the Congress which is applicable to the material" must be read in the context of this particular contract. When it is so read, a result different from that reached in *United States* v. *Kansas Flour Mills Corp.* is indicated.

The present contract provides for payment by the United States of sales and other taxes thereafter imposed by Congress and made applicable to the rice. But while it makes that provision for upward readjustment of the price, it provides for no downward revision in case of subsequent changes in any tax. That silence gains added significance here in view of the fact that at the time the contract was made the payment of these processing taxes was being hotly contested and the litigation resulting in *United States* v. *Butler*, *supra*, was well under way. The inference is strong therefore that the parties intended the price to be firm, except as it might be increased through the imposition of new taxes. The provision for the inclusion of applicable taxes provides a formula for determining the price to be billed. Since the tax in question could not by the terms of the contract be billed to the United States, there was no overcharge. If the contractor lawfully avoids payment of a tax he reduces his cost and increases his profit. But in absence of a provision which authorizes it the reduction of cost is hardly the basis of a refund to the United States. As the Court of Claims points out, it is hard to see how the vendor could be required to pay the United States any savings which it made as a result of reductions in tariff duties. Yet the difference between them and other taxes under this contract is not apparent. Although there will be exceptions, in general the United States as a contractor must be treated as other contractors under analogous situa-

tions. When problems of the interpretation of its contracts arise the law of contracts governs. *Hollerbach* v. *United States*, 233 U. S. 165, 171-172; *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 298-299. We will treat it like any other contractor and not revise the contract which it draws on the ground that a more prudent one might have been made. *United States* v. *American Surety Co.*, 322 U. S. 96.

Affirmed.

Mr. Justice Black dissents.